

Revisiting the Role of the Public Interest in Merger Control

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ABSTRACT

In the light of advances in economic theory and harmonisation initiatives, most jurisdictions now adopt a competition effects-based approach to merger control assessments. Given the emphasis that these assessments now afford to competition criteria, it might be said that the influence of wider ‘public interest’ considerations has become increasingly marginalised. Nevertheless, despite this marginalisation, most domestic merger regimes continue to reserve a role for public interest criteria, albeit a very restricted one in most cases. This has fuelled an on-going debate regarding the wisdom and legitimacy of considering public interest criteria in the merger assessment process. One argument, often cited by competition purists, is that pursuing a strict adherence to competition principles will deliver optimal long-term benefits for both consumers and the public at large. The main counter-argument has centred on the perceived inability of competition to respond to short-term public interest concerns which, if left unaddressed, may have lasting implications on fundamental interests such as employment, public health and democracy.

Important questions therefore transpire: Is merger control an appropriate realm in which to address public interest concerns, or can these be dealt with more effectively via alternative policy means? If it is appropriate, how should public interest criteria be framed within the merger control legislation, and who should be tasked with applying this criteria? This thesis adopts legal and empirical research methods to scrutinise the role that states have afforded to the public interest in modern-day merger control. By drawing insights from merger regimes across the world, the thesis proposes a framework for accommodating public interest criteria effectively within merger control.

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CHAPTER 1

Introduction

1.1. SETTING THE SCENE

What factors should determine whether or not we allow two firms to merge? For many jurisdictions who implement merger control, the legitimacy of a merger is most commonly assessed according to its likely effect on competition within the relevant market. Whereas most mergers act as key catalysts for driving innovation and enhancing efficiency,¹ other mergers may have a significant adverse effect on competition, manifesting itself in the form of higher prices, less choice and a lower quality of goods and services for consumers.² Given the potential harm faced by consumers, high priority has been afforded to detecting and preventing the consummation of anticompetitive mergers in competition regimes across the world.³ Thus, there are indications that new and existing merger regimes have shown a preference towards installing an economic competition-based approach to merger assessments in recent decades.⁴

But is a competition-based approach always desirable? A merger between two large firms can have numerous externalities in addition to its impact on consumers. It may, for instance, prompt mass job losses in regions that experience high levels on

¹ Andreas Stephan, 'Did Lloyds/HBOS mark the failure of an enduring economics-based system of merger regulation?' (2011) 62(4) Northern Ireland Legal Quarterly 539, 550.

² Broadly speaking, these adverse effects are likely to arise where a merger creates an entity that has the ability to unilaterally exercise market power to raise prices. Alternatively, the merger may create market conditions that increase the scope for collusion between firms, particularly in situations of oligopoly. See Massimo Motta, *Competition Policy: Theory and Practice* (CUP 2004) 231-252.

³ More than one hundred domestic states have now implemented a formal merger regime. Joaquín Almunia, 'Policy Objectives in Merger Control' (Fordham Competition Conference, New York, 8 September 2011) <http://europa.eu/rapid/press-release_SPEECH-11-561_en.htm?locale=en> accessed 20 September 2015.

⁴ Frédéric Jenny, 'Substantive convergence in merger control: An assessment' (2015) 1 *Concurrences* 21, 31-33.

unemployment. Equally, the merger may pose foreseeable risks to public security, a diverse media or a stable banking system. In cases where these externalities transpire, should the wider public interest be considered in addition to competition before deciding whether or not a merger should be allowed to proceed? This is a question that continues to divide opinion and there are contrasting schools of thought between and within academic, practitioner and policy-making circles. At one extreme are those who believe wider social concerns should be treated on a par with competition and who advocate for a broad public interest test for merger assessments. At the opposite extreme are the ‘competition purists’; those who believe in the benefits of a strict adherence to competition criteria that will incentivise merger activity, optimise consumer welfare and, ultimately, achieve long-term social goals. Of course, between these two extremes, there also lies a middle ground. This is a broad-ranging school of thought that appreciates the advantages of assessing the majority of mergers on competition grounds, but who believe mergers bearing certain characteristics should be subjected to additional public interest scrutiny. Yet the task of defining this middle ground has proven far from straightforward in practice. The persuasive arguments ‘for’ and ‘against’ the use of public interest criteria have divided the middle ground and, as a consequence, there remain genuine doubts over the precise role that the public interest should play in the twenty-first century.

Numerous arguments have been cited in opposition to assigning a role to the public interest in merger assessments. Public interest criteria are said to create uncertainty within the assessment process,⁵ they can leave decision-makers prone to regulatory capture,⁶ their application can lead to distorted competition in markets,⁷ and states

⁵ Alex Chisholm, ‘Competition and politics: what does a healthy relationship look like?’ (Chatham House conference on ‘Politicization of Competition Policy: Myth or Reality?’, London, 18 June 2015) <<http://www.gov.uk/government/speeches/alex-chisholm-speaks-about-competition-and-politics>> accessed 20 September 2015.

⁶ Mario Mariniello, Damien Neven and Jorge Padilla, ‘Antitrust, Regulatory Capture and Economic Integration’ (2015) Bruegel Policy Contribution 2015/11, 4 <<http://www.bruegel.org/publications/publication-detail/publication/891-antitrust-regulatory-capture-and-economic-integration/>> accessed 20 September 2015.

⁷ Stephan (n 1) 547.

may be tempted to abuse them in order to serve illegitimate protectionist purposes.⁸ Moreover, many competition purists suggest that the short-term social goals which public interest criteria seek to achieve can also be realised in the long-term by pursuing a strict adherence to competition principles.⁹ As such, they consider a strict competition-based approach to be preferable, given that it allows these wider social goals to be achieved without distorting competition; thus delivering optimal long-term benefits for both consumers and the public at large.

Conversely, the main argument in support of the application of public interest criteria has centred on the perceived inability of competition to respond to short-term public interest concerns which, if left unaddressed, may have lasting implications for fundamental interests such as employment, public health and democracy. One has only to reflect on the disastrous effects of the Global Financial Crisis of 2007-08 on the world economy and, in particular, the banking sector. Were it not for the reaction of many states to relax their competition laws,¹⁰ many more banks would have failed, undoubtedly with catastrophic consequences for the wider economy.¹¹ Assigning a role to public interest criteria within a merger regime facilitates a degree of flexibility, which can be exercised in response to market failures that competition law seems unable to remedy.

⁸ Galloway points out that, while the shift away from public interest criteria and political decision-making has reduced the scope for direct protectionism, this has actually had the effect of increasing the visibility of protectionism by forcing industrial policy considerations ‘out from the shadows of opaque public interest tests’; Jonathan Galloway, ‘The pursuit of national champions: the intersection of competition law and industrial policy’ (2007) 28(3) *European Competition Law Review* 172, 182.

⁹ Alexander Schaub, the former Director General for Competition at the European Commission, has suggested that competition should be viewed as an essential mechanism for achieving fundamental objectives in the long-term; Alexander Schaub, ‘Working Paper VII’ in Claus Dieter Ehlermann and Laraine L Laudati (eds), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Hart Publishing, Oxford 1998) 125-126. For a contrary opinion, where the author shows scepticism towards the ability of competition to serve the public interest with regards to media plurality, see Howard A. Shelanski, ‘Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?’ (2006) 94(2) *California Law Review* 371.

¹⁰ This relaxation of competition laws saw many governments award state aid to failing banks in order to secure their financial stability. The merger of *Lloyds/HBOS* in the United Kingdom also saw the Secretary of State intervene to permit an otherwise anticompetitive merger on public interest grounds; the case is considered at length in Chapter 4.

¹¹ See, in general, Bruce Lyons, ‘Competition Policy, Bailouts, and the Economic Crisis’ (2009) 5(2) *Competition Policy International* 25.

Indeed, it appears that most arguments in favour of affording a role to public interest in merger control are, at least in part, based on the premise that competition does not offer a solution to all of society's problems. Take developing and emerging countries, for example. Many of these states suffer with the realities of economic inequality and mass unemployment, so they pursue development goals in an effort to address these concerns. With regards to merger control in these countries, it is not immediately obvious how a strict competition-based approach to merger assessments is conducive towards achieving these development goals. If a merger raises no competition concerns but is likely to result in substantial redundancies to the collective workforce, competition would actually appear counterintuitive to these goals. However, if developing states implement public interest criteria, which allows development issues to be considered in addition to competition, the assessment process can consider the effect a merger will have on other key domestic goals that are essential to a country's progress.

Every merger regime bears its own unique characteristics which enable it to act in accordance with the underlying objectives and principles at play in the jurisdiction in question. However, despite these unique domestic characteristics, the notion that competition-based merger control can deliver optimal benefits to consumers and wider society has become a prominent school of thought in global policy spheres.¹² In terms of how this school of thought has influenced the design of merger control worldwide, evidence implies that it has at least prompted the majority of states to frame their merger assessments primarily according to the effect that a transaction has on competition within the relevant market.¹³ The rise of this competition-based school of thought can primarily be attributed to three main catalysts: (i) an increased

¹² For example, guidance issued by the ICN – one of the foremost promoters of international harmonisation of competition policy – advises that its members should take steps to ensure that their merger control regimes focus exclusively on addressing anticompetitive mergers and 'should not be used to pursue other goals'; International Competition Network, 'ICN Recommended Practices for Merger Analysis' (2009) <<http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf>> accessed 31 May 2016.

¹³ See eg Jenny (n 4) 31, who observes the prominence that is now afforded to competition-based tests in international merger control, particularly the 'significant impediment on effective competition' (SIEC) test and the 'substantial lessening of competition' (SLC) test.

appreciation of the benefits of competitive markets,¹⁴ (ii) the emergence of more sophisticated methods for estimating the impact of a merger on competition,¹⁵ and (iii) the introduction of new pro-competition harmonisation initiatives by international organisations and networks.¹⁶

The rise of this school of thought also raises an interesting point with regard to the direction that international merger control is heading in. Despite the emphasis that has been attributed to competition-based criteria in recent decades, it is important to note that this does not itself imply a move away from the use of public interest criteria in merger control.¹⁷ It does, however, suggest that ‘competition’ will frequently represent the default assessment criterion in many regimes, leaving the role of the public interest largely restricted, but by no means been eradicated entirely. On the contrary, the vast majority of domestic merger regimes continue to reserve a role for public interest criteria within their assessment provisions, albeit a very narrow one in most cases.¹⁸ It is therefore of little surprise that the public interest remains such a controversial discussion point, given its enduring presence in the face of a strong pro-competition rhetoric.

In a manner of speaking, then, the competition law community has reached a crossroads when it comes to facilitating harmonisation in international merger control.

¹⁴ For a comprehensive overview of competition advocacy and the perceived ‘healing powers’ that competition affords to the economy and society at large, see Maurice E. Stucke, ‘Is competition always good?’ (2013) 1(1) *Journal of Antitrust Enforcement* 162, 165-167.

¹⁵ See, for example, the methods used to apply the Bertrand and Cournot competition models in International Competition Network, ‘The Role of Economists and Economic Evidence in Merger Analysis’ (12th Annual Conference of the ICN, Warsaw, April 2013).

¹⁶ Such initiatives have sought to encourage both substantive and procedural uniformity across countries, with notable signs of convergence in many areas; Jenny (n 4).

¹⁷ Two examples of where there is observable evidence of convergence away from the public interest and towards a competition-based approach include: the United Kingdom (which adopted the SLC test under the Enterprise Act 2002, having previously adopted a broad public interest test) and Belgium (which, by virtue of the Competition Act 2013, removed the residual power of ministers to overturn decisions of the competition authority on public interest grounds). Compare this to countries with alternative ‘starting points’ such as the United States (a regime founded on competition principles, which continue to the present day), and South Africa (a regime founded on public interest principles, which sees public interest criteria assessed on an even keel with competition criteria).

¹⁸ The empirical analysis in Chapter 6, below, estimates that 88% of merger regimes adopt some form of public interest criteria. In 78.8% of cases, these criteria are framed narrowly as either an ‘exception’ to competition criteria, as a parallel sector-specific policy or as a combination of the two.

One way forward is to continue on the path towards total uniformity, in the hope that there will come a time when every state assesses mergers purely on the basis of competition criteria. The alternative option is to ask whether complete uniformity is impossible because of an inherent need for certain countries to consider public interest criteria. If such a need exists – and is legitimate – it follows that future harmonisation efforts should seek to propose measures for accommodating public interest criteria in a way that facilitates certainty and minimises disruption to competition.

1.2. PURPOSE OF THE THESIS

The purpose of this thesis is to revisit and evaluate the role that states have attributed to the public interest in modern-day merger control, with a view to proposing a framework under which public interest criteria can be accommodated effectively in practice. In pursuit of this aim, this thesis seeks to address two core research questions:

- If it is legitimate to consider public interest criteria in merger assessments, how should this criteria be framed within merger control regimes?
- And who should be tasked with making decisions based on these criteria?

Collectively, the answers to these questions lay the foundations for the framework that the thesis proposes in Chapter 6 for accommodating the public interest in modern-day merger control. In order to address these questions comprehensively, it is also necessary to explore additional questions relating to the unique intricacies of merger control and the public interest. For example, should decision-makers seek to ‘balance’ competition and public interest criteria in merger assessments and, if so, how can this be achieved? These questions are considered at regular intervals throughout the thesis, before the framework in Chapter 6 seeks to synthesise the findings relating to each. In addition to these normative questions, the thesis also answers the descriptive question of ‘How have states accommodated the public interest in practice?’ in Chapter 5.¹⁹

¹⁹ An empirical assessment is undertaken in order to answer this question.

1.3. SIGNIFICANCE AND ORIGINALITY

Merger control has been implemented in over one hundred countries across the world and has become a crucial component in many competition enforcement regimes.²⁰ However, in the light of the aforementioned harmonisation initiatives introduced by the epistemic communities, which seek to encourage domestic states to adopt a competition-based approach to merger control, one could infer that public interest mergers are becoming a largely redundant concept in competition law and, as such, offer little in the way of academic or policy relevance. But the fact that most merger regimes continue to reserve a role for the public interest is a testament to its enduring significance in the twenty-first century. In many respects, the role of the public interest is of greater academic intrigue today compared to when it featured more prominently in the merger control landscape. Many legislators are now faced with the practical problem of drafting laws that can accommodate both competition and public interest criteria effectively. Equally, decision-makers face the difficulties of giving effect to the public interest while simultaneously upholding the competition-based principles that so often direct their assessments. This is illustrative of the numerous substantive and procedural problems that have surfaced as the role of the public interest has become more obscure.

The timing of this thesis, in the aftermath of one of the most crippling economic crises in living memory, represents an ideal opportunity to consider how nations have adopted public interest measures in order to counteract the effects of economic decline. Out of all of the enforcement tools at the disposal of a competition regime, merger control has the greatest potential to play a defining role in times of economic recovery. In contrast to collusive agreements, monopolistic practices and abuses of dominance, mergers are readily observable and, as such, many more cases come before the decision-maker.²¹ Consequently, merger control can represent a valuable tool during the recovery process, as states can relax their strict competition-based

²⁰ Almunia (n 3).

²¹ Indeed, an inherent obstacle of cartel enforcement is detecting collusion in the first place.

approach and shift emphasis towards achieving short-term recovery goals. Indeed, the potential for merger control to be used as a tool for directly altering the structure of markets is a key reason why this thesis focuses specifically on merger control instead of competition law in general.²² No other competition enforcement tool is capable of affecting markets with the same immediacy as merger control.

With regards to the originality of the research, there are numerous topics within the existing literature that the thesis seeks to contribute towards. A significant body of literature in this area has either focussed on the application of individual public interest objectives within merger control,²³ or on the broader role of the public interest in specific jurisdictions.²⁴ These studies often undertake a micro-legal evaluation of merger provisions relating to the public interest, and whether any benefit can be derived from substantive or procedural reform.²⁵ This can be a very fruitful exercise

²² Sokol and Blumenthal note how the ex ante nature of merger control makes it particularly advantageous in terms of seeking to pre-empt harmful outcomes; D. Daniel Sokol and William Blumenthal, 'Merger Control: Key International Norms and Differences' in Ariel Ezrachi, *Research Handbook on International Competition Law* (Edward Elgar 2012) 320. A prime example is the *Lloyds/HBOS* case, where the UK Government actively encouraged the merger of two domestic banks in order to secure the immediate stability of both HBOS and, in turn, the UK financial system as a whole. Government intervention meant the assessment process was fast-tracked and avoided referral to a full competition inquiry at Phase 2. This case is discussed in detail in Chapter 4.

²³ Such examples include Bania on 'media plurality', Konstantina Bania, 'European merger control in the broadcasting sector: Does media pluralism fit?' (2013) 9(1) *Competition Law Review* 49; Canoy and Sauter on 'healthcare', Marcel Canoy and Wolf Sauter, 'Out of Control? Hospital mergers in the Netherlands and the public interest' (2010) 31(9) *European Competition Law Review* 377; and Geradin and Girgenson on 'industrial policy', Damien Geradin and Ianis Girgenson, 'Industrial Policy and European Merger Control – A Reassessment' (2011) TILEC Discussion Paper 2011-053 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937586> accessed 20 September 2015.

²⁴ For example, there exist several studies on the application of public interest criteria in the UK merger regime; see eg Cosmo Graham, 'Public Interest Mergers' (2013) 9(2) *European Competition Journal* 383; and Martin McElwee, 'Politics and the UK Merger Control Process: The public interest exceptions and other collision points' (2010) 9(1) *Competition Law Journal* 77. The same is true of assessments on the EU merger regime; see eg Alison Jones and John Davies, 'Merger control and the Public Interest: Balancing EU and National Law in the Protectionist Debate' (2014) 10(3) *European Competition Journal* 453. In terms of jurisdictional studies of public interest in other areas of competition law, Townley has dissected the potential application of public interest goals in the context of the EU prohibition on collusive practices; Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing, Oxford 2009). Also, for an assessment of public interest goals in the broader EU competition law context, see eg Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' (2013) CLES Working Paper 3/2013 <<https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-3-2013>> accessed 20 September 2015.

²⁵ Reference to 'micro-legal study', in this context, refers to research that 'analyses a specific legal problem' (eg a statutory provision or a case); Mathias M. Siems, 'Legal Originality' (2008) 28(1) *Oxford Journal of Legal Studies* 147, 148.

in terms of evaluating the effectiveness of the law and exploring how different states have dealt with the public interest in practice.²⁶ However, it does appear that the legal scholarship in this area has moved further towards micro-legal analyses when there remain overarching macro-legal questions that have yet to be explored in detail.²⁷ As such, the thesis as a whole adopts an altogether more macro-legal approach, assessing the role of the public interest – as a wider fluid concept – within the context of merger control in general. In adopting this approach, the thesis is able to conduct an in-depth assessment into the public interest dimension of merger control that is unique within the existing literature. Moreover, this approach enables the thesis to propose a framework for accommodating public interest criteria in merger control, which can provide broader guidance to states seeking to implement public interest criteria effectively. The framework can also inform further micro-legal studies in the future, particularly with regards to the intricate application of specific public interest criteria and the effect that socio-economic variables can have on how a state chooses to accommodate the public interest in its merger laws.

Originality is further derived from the normative stance that the thesis takes on the prevailing orthodox position that a strict competition-based approach is the only suitable approach in modern-day merger control. There exists an abundance of compelling economic literature that corroborate the perceived benefits of adhering to strict competition-based criteria, rather than public interest criteria, in the pursuance of long-term economic and social goals.²⁸ Although it is not the intention of this thesis to challenge the robustness of these economic cornerstones,²⁹ it does attempt to

²⁶ As such, Chapters 3 and 4 each adopt a micro-legal approach.

²⁷ Namely, the two core research questions listed in section 1.2, above. Siems defines ‘macro-legal questions’ as those which explore the ‘general concepts, problems and principles of the law’, particularly with regard to how ‘an entire area of law is structured’. Mathias M. Siems, ‘The Taxonomy of Interdisciplinary Legal Research: Finding the Way out of the Desert’ (2009) 7 *Journal of Commonwealth Law and Legal Education* 5, 6.

²⁸ This literature, which is referenced throughout the thesis, cites the benefits competition-based assessments deliver for inter alia economic growth, political stability and legal certainty. For a comprehensive overview the theories of harm with regards to mergers, specifically, and how a competition-based approach can deliver benefits, see Motta (n 2) 233-264.

²⁹ In fact, the research openly accepts the benefits that can accompany a strict competition-based approach in most circumstances.

question the effectiveness of a strict competition-based approach from a legal perspective, particularly in jurisdictions that place emphasis on the pursuance of wider social goals. As a result of the conclusions it draws from this normative stance, the thesis advocates a novel change of strategy with regards to the current harmonisation efforts in international merger control. It advises that competition convergence champions (such as the ICN, OECD and UNCTAD)³⁰ should accept that the uniform adoption of a strict competition-based approach to merger control is inherently limited by the need for states to protect their fundamental public interest goals. While further substantive convergence may be possible in the future, harmonisation efforts for the time being should focus on how states can seek to accommodate public interest criteria in ways that minimise disruption to competition.

1.4. METHODOLOGY

The thesis makes use of a combination of legal doctrinal and empirical research methods in order to gather insights that inform its conclusions. The three substantive chapters in the thesis (Chapters 3-5) constitute the main sources of legal analysis. Chapter 3 presents a case study of merger control in the European Union and, in doing so, undertakes a doctrinal analysis that draws on primary legislation, case law and commentary from academics and practitioners. Chapter 4 also adopts a doctrinal approach to examine the challenges the United Kingdom has faced in implementing the public interest. The chapter affords particular consideration to political science theory to draw additional insights on why the UK law has evolved in practice. Chapter 5 conducts an empirical analysis of the laws and institutional arrangements of 75 domestic merger regimes. The chapter makes use of a comprehensive data set that has been compiled for the express purpose of (a) identifying the global norms of how states have accommodated public interest criteria in practice, and (b) assessing the influence that certain socio-economic factors have on the role that states afford to the public interest. In order to establish whether relationships exist between these socio-

³⁰ The International Competition Network, The Organisation for Economic Co-operation and Development, and The United Nations Conference on Trade and Development.

economic factors and the methods of accommodation, the data is subjected to various forms of statistical testing.³¹

As has been referred to in Section 1.1, above, the thesis addresses three main research questions. All three of these resemble macro-legal research questions, in that they each question the general concepts of the law relating to public interest considerations in merger control. However, the jurisdictional case studies undertaken in Chapters 3 and 4 – concerning the European Union and the United Kingdom respectively – pose a number of micro-legal questions relating to specific merger cases and statutory provisions.³² The answers to the micro-legal questions in these chapters will inform the two main macro-legal questions that this thesis seeks to answer.

Every effort has been made to ensure that this thesis reflects the relevant law as it stood on 30 June 2015.³³

1.5. OUTLINE OF THE THESIS

The thesis seeks to answer its core research questions by examining – from a national, supranational and international perspective – the role played by the public interest in merger control. Overall, the thesis consists of seven chapters, three of which (Chapters 3-5) are substantive. The chapters proceed as follows.

Chapter 2 sets the scene for the thesis by exploring some of the key discussion points of the research topic and outlining the abstract notion of the public interest, including a discussion of its definition and its relationship with competition. It also introduces

³¹ This approach resembles what Siems refers to as ‘scientific legal research’, a means of testing legal hypotheses using statistical techniques with a view to drawing ‘original’ conclusions. Siems (n 25) 157.

³² *ibid* 6.

³³ The exception to this is the empirical study in Chapter 5, which considers the domestic laws of the 75 sample states as they appeared on 1 January 2014. This is due to the practical constraints posed by the expansive data collection that has been undertaken in order to conduct the empirical analysis.

the key concerns that are most often cited when incorporating public interest criteria within a merger control regime.

Chapter 3 considers the public interest from a supranational perspective, relying on the unique interstate dynamics at play in the European Union. The chapter explores the extent to which public interest goals have influenced merger investigations by the European Commission, in light of the strict competition-based approach it has adopted under the EU Merger Regulation. It proceeds to evaluate the validity of the Commission's assessment process with regards to the Merger Regulation and its underlying responsibilities under the Lisbon Treaty. Finally, the chapter examines the competence that remains for the twenty-eight EU Member States to intervene in the Commission's merger assessments on legitimate public interest grounds under Article 21(4) of the EU Merger Regulation.

In the light of proposals by politicians to extend the list of public interest exceptions under its merger provisions,³⁴ or to return to a broad public interest test,³⁵ Chapter 4 offers a critique of the role of public interest criteria in the United Kingdom's merger regime.³⁶ In the first instance, the chapter scrutinises two perceived weaknesses of the

³⁴ In their General Election manifestos of 2015, both the Labour Party and the Liberal Democrat Party included a pledge to add to or 'strengthen' the public criteria with UK merger control: UK Labour Party, 'Britain can be better' (Labour 2015 General Election Manifesto, April 2015) 21 <www.labour.org.uk/page/-/BritainCanBeBetter-TheLabourPartyManifesto2015.pdf> accessed 31 May 2016; and UK Liberal Democrat Party, 'Stronger Economy. Fairer Society. Opportunity for Everyone' (Liberal Democrat 2015 General Election Manifesto, April 2015) 35 <https://d3n8a8pro7vhmx.cloudfront.net/libdems/pages/8907/attachments/original/1429028133/Liberal_Democrat_General_Election_Manifesto_2015.pdf?1429028133> accessed 31 May 2016.

³⁵ Before the 2010 General Election, the Liberal Democrats proposed to 'restore a public interest test so that a broader range of factors than just competition can be considered by regulators when takeovers are proposed'; UK Liberal Democrat Party, 'Change that Works for You: Building a fairer Britain' (Liberal Democrat 2010 General Election Manifesto, April 2010) 26 <www.politicsresources.net/area/uk/ge10/man/parties/libdem_manifesto_2010.pdf> accessed 31 May 2016. One of the more novel proposals of the election campaign was made by the UK Independence Party, who pledged to create a 'British Register' that would impose stricter public interest conditions on specific UK companies of national significance; UK Independence Party, 'Empowering the people' (UKIP 2010 General Election Manifesto, April 2010) 13 <<http://www.politicsresources.net/area/uk/ge10/man/parties/UKIPManifesto2010.pdf>> accessed 31 May 2016.

³⁶ The progression of thesis from a supranational perspective (in Chapter 3) to a national perspective (in Chapter 4) is intentional, given that some UK merger transaction will be subject to the EU Merger Regulation.

current regime by (i) undertaking a detailed review of the Secretary of State's residual power to propose new public interest considerations by virtue of section 58(3) of the Enterprise Act 2002, and (ii) evaluating the effectiveness of current decision-making arrangements, where the Secretary of State bears the sole power to decide on the outcome of mergers raising public interest concerns. The chapter then proceeds to assess the implications that these weaknesses are likely to have in practice, should the list of public interest exceptions be extended.³⁷ It concludes by expressing concern at the threat of public interest criteria undermining the wider UK merger control regime in the future, but suggests that this threat can be alleviated by imposing formal restraints on section 58(3), publishing detailed guidance as to its intended application and by imposing measures to limit the Secretary of State's risk of regulatory capture.

Chapter 5 further expands the geographical scope of the thesis by conducting an empirical study of 75 domestic merger regimes in order to draw insights on two distinct lines of enquiry. Firstly, the chapter identifies the different methods by which states have chosen to accommodate public interest criteria within their domestic merger laws. It finds that most states will: (i) treat the public interest as an 'exception' to a competition-based test or frame it within sector-specific policy, and (ii) assign decision-making powers to either a national competition authority or a politician. Secondly, the chapter identifies the socio-economic factors that may be capable of influencing a state's chosen method of accommodating the public interest. The analysis suggests that factors traditionally thought of as influential (such as geographic locality, economic development and the type of legal regime in place) have only a negligible influence on the chosen method of accommodation. There is, however, evidence to suggest that the political stability of a state has a notable influence on how states choose to frame public interest criteria within legislation.

³⁷ It does so by affording particular scrutiny to the previous application of public interest criteria in the cases of *Lloyds/HBOS* and *NewsCorp/BSkyB*, and the decision to avoid considering the public interest in *Kraft/Cadbury* and *Pfizer/AstraZeneca*.

Chapter 6 presents a synthesis of the main findings of Chapters 3-5 and evaluates these against the strict competition-based rhetoric that prevails in this area of law. The chapter begins by evaluating the validity of the arguments that are most frequently cited in opposition to the use of public interest criteria. It therein proposes a change of strategy with regards to harmonisation initiatives in international merger control, suggesting that states should be given greater guidance on how to implement public interest criteria while minimising distortions to competition. To lay the foundations of this guidance, the chapter presents a framework under which states can seek to accommodate public interest criteria effectively.

Chapter 7 summarises the key findings of the thesis and the policy recommendations it puts forward. The chapter finishes by outlining some future research possibilities that would allow the thesis project to be extended further.

1.6. LIMITATIONS

The author is mindful of the general limitations that are associated with empirical legal research and that these should be borne in mind when interpreting the findings presented in Chapter 5.³⁸ Given that one of the aims of the chapter is to identify the global norms of how states accommodate the public interest in merger control, it has been necessary to analyse a relatively large sample of 75 domestic states. There are numerous practical constraints associated with undertaking a legal doctrinal analysis of the entire sample,³⁹ whereas an empirical approach avoids these problems in the most part. However, in order to model the different ways in which states have sought to accommodate the public interest, it has been necessary to make several assumptions regarding the effect that legislation has had on merger control in practice. These specific assumptions are detailed in Chapter 5 but, broadly speaking, the chapter

³⁸ Siems (n 25) 161. See also, in general, Mathias M. Siems, 'Numerical Comparative Law: Do we need statistical evidence in law in order to reduce complexity?' (2005) 13 *Cardozo Journal of International & Comparative Law* 521.

³⁹ See Chapter 6 for an explanation of the practical obstacles faced by a doctrinal approach in this context.

makes the general assumption that, when assessing a merger, states will not depart from the rules outlined in their merger legislation. The decision to take the legislative provisions of the domestic statute at face value, without proceeding to inspect whether the states have adhered to these provisions in practice, has been made for practical reasons. The adverse consequence of this approach is that the empirical findings merely reflect legal positivism (the law as it appears in the statute books), rather than legal realism (the law as it is seen to work in practice).⁴⁰ However, despite these limitations, the various benefits that can be derived from undertaking an empirical analysis, particularly with regards to identifying relationships and norms within a large sample of states, are sufficient to justify the use of empirical methods in this chapter. Moreover, the empirical findings can form the basis of future research that makes use of additional methods in order to bring the research into the realms of legal realism.

⁴⁰ Legal academics generally attribute greater legitimacy to legal realism than legal positivism, because of what the former can reveal about the *effect* of law, rather than its mere application. For example, in the context of identifying the goals of competition law, Dabbah warns against the pitfalls of placing too much emphasis on legislative intent because goals are subject to change over time; Maher M. Dabbah, *International and Comparative Competition Law* (CUP 2010) 38. However, some commentators continue to argue the merits of both realist and positivist approaches; see eg Brian Leiter, 'Legal Realism and Legal Positivism Reconsidered' (2001) 111(2) *Ethics* 278.



CHAPTER 2

Setting the Scene: The notion of the public interest in merger control

2.1. INTRODUCTION

What do we mean when we refer to ‘the public interest’ in the context of merger control? How can we define it and how does it relate to our modern-day perceptions of ‘competition’ and what competition law should achieve? In many ways, the answers to these questions are subjective; they are dependent on the importance that one attributes to wider societal goals and the function that we believe competition policy should perform. Although there are numerous academic studies that examine the broad notion of the public interest in competition law, the inherent subjectivity that this examination entails has led to conflicts and uncertainty as to its definition and purpose. Therefore, if this thesis is to assess the role of the public interest in merger control effectively, it is first necessary to lay a few of these conflicts to rest.

This chapter sets the scene for the thesis by exploring some of the key discussion points and literature that has addressed the notion of the public interest in merger control. Section 2.2 seeks to consolidate the various meanings that have been attributed to ‘the public interest’ in the existing literature and, in so doing, proposes a definition that will be used for the purposes of this thesis. Section 2.3 dissects the unique and intricate relationship between competition and the public interest, considering their compatibility, the dynamics between them, and the prospects of accommodating each of them under a ‘mixed’ approach to merger assessment. Section 2.4 introduces the main concerns that have been associated with considering public interest criteria in merger assessments; including the dilemma of who to appoint as a decision-maker, the emergence of protectionism, the risk of detracting from the benefits of competition, and the impact on legal certainty. Section 2.5 presents concluding remarks.

2.2. DEFINING THE PUBLIC INTEREST

In order to draw tangible insights on the role of the public interest in merger control, it is first necessary to establish what is meant by ‘the public interest’ in this context. The task of defining and identifying what is ‘in the public interest’ has rarely proved straightforward for decision-makers and academic commentators. The ‘public interest’ is an abstract concept, meaning its definition will vary depending on the social norms and economic climate of the legal system in question,¹ as well as the political and historical features that are most reflective of the nation.² Moreover, it can be seen as a fluid concept, one that is subject to change over the course of time. For example, a merger in a country with a high level of unemployment may consider ‘employment’ to be an important public interest criterion, if the merger is likely to result in mass redundancies. Many years later, when the level of employment has vastly improved, the ‘employment’ criterion might not carry the same weight that it once did.³ This is a matter of degree. The notion of ‘employment’ never ceases to be ‘in the public interest’ but, as the need to address unemployment becomes less pressing in a country, the reasons and justifications for considering it as a public interest criterion become increasingly blurred. Furthermore, scholars have also ascribed different interpretations to the public interest depending on whether they approach it from a legal, economic or political science perspective.⁴

Given these conceptual disparities, one can easily be led into a debate about what individual factors should be deemed to be ‘in the public interest’. But to engage in this debate at this stage would be to ‘jump the gun’ somewhat. As we are seeking to establish a definition for the public interest in the context of merger control, one

¹ Charles and Webb, for example, emphasise the ‘ill defined’ nature of the public interest, suggesting that it can bear a wide variety of meanings across different countries and between different groups of people. ST Charles and AL Webb, *The Economic Approach to Social Policy* (Harvester Press 1986) 3.

² Stephen Wilks, *In the public interest* (Manchester University Press 1999) 19.

³ Instead, states may feel that greater benefits can be derived from the efficiencies that stem from redundancies.

⁴ See, for example, Alan Griffiths and Stuart Wall, *Economics for Business and Management* (2nd edn, Prentice Hall 2008) 194, which refers to productive and allocative efficiency (the two pillars of economic efficiency) as ‘two key elements of any definition of the ‘public interest’.

solution is to consider the concept of the public interest alongside competition.⁵ This has been attempted by several studies within the literature, and has resulted in the public interest being referred to with multiple terminologies. For example, the terms ‘non-competition interest’,⁶ ‘non-economic considerations’,⁷ ‘non-efficiency goals’,⁸ ‘equity non-economic goals’,⁹ and ‘social interest’¹⁰ are just a few examples of the alternative labels that commentators have attributed to the public interest in the past. These are, in the most part, used interchangeably to describe the same category of interests. However, these terms can themselves be afforded different definitions in legal and economic circles, which poses further problems when attempting to formulate a definition for the public interest in the merger control context. For example, it has been suggested that ‘non-competition interests’ can be translated into economic efficiencies, which – although not strictly a competition consideration – is an ‘economic consideration’ that is made in competition law assessments.¹¹ This means that a ‘non-competition interest’ will not necessarily amount to a ‘non-economic interest’, if we apply this broader definition that includes efficiencies.

⁵ Indeed, it has been suggested that defining the public interest in relation to competition (rather than in a broad legal sense) has become the default practice in practitioner circles; see Aeron Davis and others, ‘Takeovers and the Public Interest: Responsible Capitalism in Practice’ (2013) Policy Network Paper 7 <www.policy-network.net/publications/4435/Takeovers-and-the-Public-Interest> accessed 25 September 2015.

⁶ Lavrijssen uses the term ‘non-competition’ interests to describe ‘public policy arguments, such as the protection of public health’; Saskia Lavrijssen, ‘What role for National Competition Authorities in Protecting Non-competition Interests after Lisbon?’ (2010) 35(5) *European Law Review* 636, 636. Monti also refers to ‘non-competition factors’ as instruments for achieving a wide range of public policy goals; Giorgio Monti, ‘Article 81 EC and Public Policy’ (2002) *Common Market Law Review* 1057, 1083.

⁷ Giorgio Monti, *EC Competition Law* (CUP 2007) 89.

⁸ Kieran uses ‘non-efficiency goals’ to describe ‘public goods and public interests other than competition and economic efficiency’. He cites the examples of employment creation, environmental protection, health and safety, and promoting ethical behaviour. Francis Kiernan, ‘A Separation of Powers Approach to Non-efficiency Goals in EU Competition Law’ (2013) 19(1) *European Public Law* 189, 191.

⁹ Michal S. Gal and Eleanor M. Fox, ‘Drafting Competition Law for Developing Jurisdictions: Learning from Experience’ in Michal S. Gal and others, *Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar 2015).

¹⁰ Andrew Scott, ‘The Evolution of Competition Law and Policy in the United Kingdom’ (2009) LSE Law, Society and Economy Working Paper 9/2009 <http://www.lse.ac.uk/collections/law/wps/WPS2009-09_Scott.pdf> accessed 26 September 2015.

¹¹ Semmelmann notes the possibility of ‘translating’ non-competition interest in this way. For her study, she makes the distinction between ‘*competition (-related) and non-competition* goals corresponding to the distinction between market- and non-market goals outside the field of competition law’. Constanze Semmelmann, ‘The future role of the non-competition goals in the interpretation of Article 81 EC’ (2008) *Global Antitrust Review* 15, 16.

Indeed, given that most public interest factors have a discernible economic dimension and, as such, can be translated into economic terms,¹² this makes the ‘non-economic consideration’ label somewhat unhelpful with regards to defining the public interest.¹³

Perhaps, then, it is beneficial to take a step back and consider the meaning of the public interest in terms of ‘goals’. Broadly speaking, the majority of goals pursued under competition policy, in any regime, can be assigned to one of two categories. On the one hand, there is the ‘economic efficiency’ category, which will entail the pursuit of allocative and productive efficiency goals through the maintenance of effective and undistorted competition within markets. Achieving these goals is said to deliver benefits to consumers in the form of eg lower prices, higher quality and greater choice among goods and services.¹⁴ On the other hand, the ‘public interest’ category will include wider policy goals, such as those relating to the environment, the maintenance of media plurality, and national security. These public interest objectives are not expected to achieve an overarching goal, such as consumer welfare but, rather, they are intended to promote and protect specific social ideologies. As such, these two sets of goals can be said to differ in terms of their underlying purpose, but this is not to say that one category is mutually exclusive of the other.¹⁵ As shall be discussed in section 2.3, these sometimes conflicting sets of goals share a unique and intricate relationship. Semmelmann describes the point well in relation to goals of EU competition law:

¹² Lavrijssen refers to the experience in the Dutch competition regime, where non-competition interests are ‘translated’ into economic values that can be more readily compared with competition; Lavrijssen (n 6) 639.

¹³ Unsurprisingly, the terminology of ‘non-economic considerations’ or ‘non-economic interests’ is used predominantly by lawyers, because economists tend not to see the relevance of distinguishing between economic and non-economic interests, given that they apply a broad welfare concept; Barbara E Baarsma, ‘Rewriting European Competition Law from an Economic Perspective’ (2011) 7(3) *European Competition Journal* 559, 584.

¹⁴ Massimo Motta, *Competition Policy: Theory and Practice* (CUP 2004) 231-252.

¹⁵ The author is mindful of the apparent ‘grey area’ that exists between these two sets of goals and notes that certain objectives, such as ‘market integration’, do not clearly fall into one category over the other. At a conference on ‘Competition and Inclusive Growth’ in 2015, OECD Competition Committee Chairman Frédéric Jenny spoke of the use of individual public interest grounds in competition law, before suggesting that ‘inclusive growth’ could be considered a public interest ground in itself; Frédéric Jenny, ‘Public Interest Issues in Competition’ (4th BRICS International Competition Conference, Durban, 12 November 2015).

The main criterion to classify a goal as [...] a non-competition goal is the absence of a cost-benefit analysis as its driving force. [Non-competition goals] are directed towards the expression of public values such as environmental protection, health protection, or the protection of cultural heritage, whereas [competition interests] aim at efficiency, lower prices, and the protection and production of material goods. This does not detract a market goal from having beneficial effects on non-market goals or even being a pre-condition for its achievement.¹⁶

Given, therefore, the adoption of competition as the primary means of achieving economic efficiency goals, it can be said that public interest goals account for any goal that is unrelated to the direct pursuance of economic efficiency (be this efficiency brought about by competition or by external efficiencies emanating from an otherwise anticompetitive merger).¹⁷ Therefore, for the purposes of this thesis, the public interest is defined as any factor that does not relate to the direct pursuit of economic efficiency goals. This affords a very broad definition to the public interest which, by these standards, can be said to encompass goals that we often understand as having an obvious economic element, including employment, financial stability and industrial policy. Equally, factors such as national security, media plurality and empowering historically disadvantaged persons will also fall within the scope of this definition. With the thesis having adopted this definition, it can now proceed to assess the dynamics of the public interest in relation to competition.

¹⁶ Semmelmann (n 11) 17.

¹⁷ Many jurisdictions (including the European Union) accept that anticompetitive mergers may be permitted if the merger creates efficiency gains that offset the harm caused to competition; see eg Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases and Materials* (5th edn, OUP 2014) 1211.

2.3. THE RELATIONSHIP BETWEEN COMPETITION AND THE PUBLIC INTEREST

Owing to the fact that the public interest has been defined negatively to incorporate any factor that is not related to competition or efficiency goals, it follows that we should also be consider the relationship between competition and the public interest. Gaining an appreciation of this relationship is important in terms of understanding how the dynamics and the interplay between these two elements in practice. It is also pivotal if the thesis is to gather insights on how the public interest is accommodated within competition law generally, and merger control specifically.

2.3.1. Is competition merely a tool for serving the public interest?

If we consider the classic competition law debate of ‘protecting competition’ versus ‘protecting competitors’, an interesting question arises regarding whether competition (as a value) should be treated as a ‘tool’ for achieving wider objectives, or as an objective in its own right.¹⁸ It is also interesting to consider this debate in terms of competition and the wider public interest: is competition a part of the wider public interest, or a merely a tool for facilitating the public interest? To answer this, we can potentially draw insights from the merger regime that the United Kingdom formerly enforced under the Fair Trading Act 1973. The Act set out a broad public interest test for assessing mergers, which required the UK competition authority to take account of five separate public interest criteria.¹⁹ The first of these criteria required the competition authority to have regard to the desirability of ‘maintaining and promoting effective competition’, as specified in section 84(1)(a) of the Act. This has symbolic significance given that it expressly acknowledges that ‘competition’, in the former UK regime at least, was considered a part of the public interest definition. In other words,

¹⁸ Oles Andriychuk, ‘Rediscovering the Spirit of Competition: On the normative value of the competitive process’ (2010) 6(3) *European Competition Journal* 575, 583.

¹⁹ Fair Trading Act 1973, ss 84(1)(a)-(e). Further discussion will be afforded to these criteria in Chapter 4.

the Fair Trading Act 1973 treated ‘competition’ as a part of the public interest and, as such, a goal in its own right, rather than a mere tool for achieving the public interest.

In the main, however, the mainstream position on the role of competition policy is that it should be looked upon as an important tool ‘to increase “more important” utilitarian economic values’, including total welfare, consumer welfare, industrial growth, and innovation.²⁰ These economic values, and ‘consumer welfare’ in particular, can be said to deliver significant benefits to the public at large, even though this is not always directly observable. This is especially true when one considers the ‘consumer dimension’ that every member of the public possesses. Therefore, although competition is most often perceived as a tool for achieving efficiency goals, it might also be capable of indirectly promoting the public interest, albeit by way of efficiency enhancement. Indeed, given the prospect of using competition as a ‘tool’ in this way, an important question arises regarding the compatibility of competition and public interest goals, which is explored in the next section.

2.3.2. Are competition and public interest goals compatible?

Is it ever possible that a merger control decision taken on competition grounds can serve the public interest, as well as the interests of economic efficiency? Consider a horizontal merger between two firms in a market, Firms A and B, where Firm A is facing insolvency and Firm B is seeking to acquire the failing firm.²¹ The merger could potentially raise competition concerns, as the consequence of Firms A and B becoming a single entity would be the loss of a competitor from the market. On the other hand, if Firm A will imminently and inevitably exit the market due to insolvency, a loss of competition within the market may itself be inevitable. However, allowing the two firms to merge may give rise to a host of economic and social benefits. The merger may enable Firm B to use Firm A’s resources to expand its operations and thereby increase its economies of scope and scale to the benefit of consumers.

²⁰ Andriychuk (n 18) 583-584.

²¹ For an example of the application of a ‘failing firm’ defence, see *Aegean/Olympic II* (Case COMP/M.6796) Commission Decision [1991] OJ C25/3.

Furthermore, the merger may offer job security to the staff of Firm A, who would otherwise face redundancy. Although this is a rather basic example, it does at least illustrate the potential for public interest and competition goals to coexist in harmony.

Indeed, there does exist a general misconception in competition law that competition and public interest goals are mutually exclusive and, thereby, incompatible with one another.²² On the contrary, there are numerous studies that have identified the wider social benefits that competition can deliver in markets of key public significance.²³ Equally, competition has also been seen as conducive to achieving non-market specific goals, such as environmental protection in the context of State Aid provision.²⁴ This is demonstrative of the fact that competition and public interest goals do not exclusively pull in opposite directions; they are compatible in the vast majority of cases. The reason for this is conceptually linked to our finding in section 2.2, namely that every public interest goal can be said to have an economic dimension, just as economic efficiency goals can be said to serve some wider social purpose.²⁵

Of course, this is not to discount the prospect of market failures occurring, ie in instances where competition is unable to serve the wider public interest and, as such, may warrant state intervention. One can envisage all manner of conflicts that can arise between competition and public interest goals when assessing mergers, many examples of which are discussed in detail in Chapters 3 and 4 in the contexts of the EU and UK merger regimes. In merger assessments, a strict adherence to competition-based criteria can lead us to overlook the effect that the transaction will have on eg employment and national security. Moreover, allowing anticompetitive mergers to proceed on public interest grounds may have serious adverse implications for

²² Hans Vedder, ‘Of Jurisdiction and Justification. Why Competition is Good for ‘Non-Economic Goals, But May Need to be Restricted’ (2009) 6(1) Competition Law Review 51, 51.

²³ For example, in the context of health care markets, den Exter and Guy explore the potential for competition (under suitable conditions) to deliver benefits to patients in terms of accessibility, service quality, and choice; André P. den Exter and Mary J. Guy, ‘Market Competition in Health Care Markets in the Netherlands: Some Lessons for England?’ (2014) 22(2) Medical Law Review 255.

²⁴ Vedder (n 22) 61-68.

²⁵ Charles and Webb, for instance, suggest that social and economic policy ‘cannot be divorced’ and that ‘[e]conomic policies may be important means to social policy ends’; Charles and Webb (n 1) 3.

consumers in a given market. This emphasises the need for decision-makers to have regard to the prospect of trading-off competition and public interest goals in merger regimes that consider both sets of criteria. We should therefore consider the different approaches that merger regimes can adopt when seeking to give effect to one, or both, of these sets of goals.

2.3.3. Competition, public interest and ‘mixed’ approaches to merger control

When designing merger control, legislators should be appreciative of the likely conflicts that may arise between conflicting goals, and the trade-off procedures that should be put in place in the event of a conflict. This can be an onerous task when lawmakers are seeking to give effect to a variety of different goals when mergers are assessed.

For example, if the legislature requires that a decision-maker conducts a trade-off between competition and public interest criteria, what exactly will this task entail? If a decision-maker is required to balance competition and the public interest to determine which should take precedent, this is likely to entail an arbitrary comparison of two sets of goals with entirely different units of measure. Does this mean that the decision-maker will have to make decisions like whether it is preferable to have a competitive market or a diverse media? Framing the trade-off in this way makes it very difficult for the decision-maker to make calculated decisions based on robust evidence. Alternatively, if the lawmakers view competition as a tool for ‘maximising consumer welfare’, perhaps the trade-off should be framed as a balancing act between public interest and consumer welfare.²⁶ This poses more credible questions, given that consumer welfare is a benefit that can be directly measured in economic terms. Of course, there also remains the need to assign an economic value to the public interest

²⁶ This is generally considered to be the way the trade-off is framed in the context of EU competition law; Andreas Strohm, ‘Competition policy at war with industrial policy?’ (2006) 11(2) European Investment Bank Papers 34, 38.

in order to allow competition and public interest criteria to be directly compared against each other.²⁷

These trade-off issues can themselves have a significant bearing on how states choose to approach merger control, in terms of accommodating public interest criteria within their merger regimes.²⁸ As Chapter 5 will reveal, there are numerous intricacies involved with accommodating this criteria, but for now it is worth considering the broad approaches that states can adopt. Imagine a spectrum ranging from a pure competition-based approach (that only takes competition criteria into consideration) to a pure public interest approach (which considers the effect that a merger has on the on the public at large). Between these two extremes, three broad categories of approach can be said to exist, as illustrated by *Figure 1*, below.

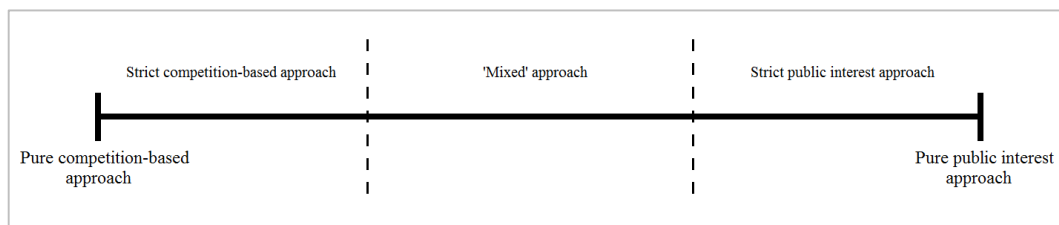


Figure 1. Spectrum illustrating the broad approaches states can adopt when seeking to consider public interest criteria within merger control.

The three approaches consist of (i) the strict competition-based approach, (ii) the ‘mixed’ approach, and (iii) the strict public interest approach. As is to be expected, public interest goals are likely to be afforded less significance towards the left-hand side of the spectrum and greater significance towards the right-hand side. The middle-ground – within the ‘mixed’ approach region – does not afford priority to either public

²⁷ As is discussed below, Townley has suggested that a direct comparison can be facilitated by adopting a so-called ‘market balancing’ approach; Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing, Oxford 2009) 7.

²⁸ See Chapter 5 of this thesis for an empirical assessment of the socio-economic factors that have the potential to influence how domestic states choose to frame the public interest within their merger control regimes.

interest or competition goals but, rather, seeks to balance each set of goals against each other, before a final decision is made.²⁹

At first glance, it is a wonder why the ‘mixed’ approach is not universally adopted by legislators when designing merger control. An approach which is able to facilitate the balancing of both competition and public interest criteria would appear to be an ideal means by which to achieve long-term economic goals while still giving effect to the public interest where it is, on balance, beneficial to do so. And, yet, the effective application of the ‘mixed’ approach is plagued by the practical limitations of balancing two sets of goals on a case-by-case basis. In order for the decision-maker to undertake a comprehensive balancing act in each individual case, a vast amount of resources and economic expertise would be required. This is a primary reason why a state may prefer to adopt a strict competition-based approach, where public interest considerations are afforded little or no scope in the merger legislation.

Whereas trade-offs constitute an inherent part of the ‘mixed’ approach, they are much less significant under a strict competition-based approach. Generally speaking, a competition-based approach is one that seeks to maximise consumer welfare, or another economic efficiency goal, by applying criteria that focus on maintaining effective levels of competition in a market. But, although a strict adherence to competition criteria is very much the default position under this approach, competition can be subject to a number of constraints relating to specific public interest goals. For example, mergers between security firms or water providers may be subject to additional sector-specific public interest criteria given their potential to impact on the public at large. In these cases, it may be necessary to trade-off the impact on competition against the public interest concern by either: (i) directly *balancing* the two interests, as in the case of the ‘mixed’ approach, or (ii) *overriding* the competition

²⁹ According to Townley, a ‘mixed’ approach shall entail one of two kinds of balancing: (a) ‘market balancing’, which entails assigning an economic value to public interest factors, so as to allow them to be directly balanced against the economic loss arising from a loss of competition; or (b) ‘mere balancing’, where public interest factors are directly balanced against economic interests, without assigning an economic value. Townley (n 27) 7.

concerns, by overlooking the competition criteria entirely and basing a judgment solely on the potential impact of the merger on the public interest.³⁰ The greater the number of public interest constraints that exist under a competition-based approach, the less strict it becomes and the more likely it is that public interest goals will influence the final outcome of a merger.

2.4. CONCERNS ASSOCIATED WITH ADOPTING PUBLIC INTEREST CRITERIA

Having considered the meaning and interaction between public interest and economic efficiency goals, we know that – although they are generally compatible – conflicts may sometimes arise between the two. In a regime that considers both sets of goals, a trade-off is inherent and the decision-maker should consider whether it is beneficial and justifiable to afford precedence to a public interest goal over a competition goal. But this very simple statement is fraught with practical, constitutional and legal concerns. These concerns have prompted the emergence of a persuasive academic rhetoric that opposes the consideration of public interest criteria in merger control. Indeed, the role that states afford to public interest goals may be largely depend on their ability to overcome these concerns in practice. Therefore, this section sets the scene for the analysis that follows in the subsequent chapters by introducing some of the main concerns associated with considering public interest criteria in merger control.

2.4.1. Selecting a decision-maker

There exists a notable constitutional issue with regards to ‘who’ should be tasked with balancing or trading-off competition criteria against public interest goals. Is this task

³⁰ This is similar to the public interest test that has been reserved for certain transactions in the United Kingdom, including those relating to national security, media plurality and stability of the financial system. The Enterprise Act 2002 requires the Secretary of State to consider both competition and public interest concerns but, as is somewhat evident from the *Lloyds/HBOS* transaction, competition concerns may be overlooked entirely.

appropriate for a national competition authority (NCA), which specialises in the economic assessment of competition within markets? Perhaps the role is more befitting a politician who, as a democratically elected representative of the public, can make decisions on behalf of the public at large? Or, particularly with regard to balancing competition and public interest goals in specific markets, the sector-specific expertise of regulators may also prove advantageous.³¹ Given the options available to them, deciding which decision-making arrangement to adopt is a conundrum faced by any state that seeks to accommodate public interest within its merger regime.

There are three main concerns involved in assigning this balancing act to either an NCA or a politician: (i) competence, (ii) constitutional legitimacy, and (iii) capture. Each of these represents a key obstacle to the effective and legitimate execution of the decision-making role with regards to public interest matters and, as such, this thesis will draw insights on each in the chapters that follow, before ultimately evaluating their threat in Chapter 6. For now, though, it is worth briefly considering each of these concerns as a means of providing context to the ongoing debate surrounding public interest decision-makers.

In terms of competence, we need to be realistic about what can be expected of decision-makers, given their level of expertise and the resources available to them. A team of competition practitioners within an NCA may be in a prime position to judge the effect that a merger will have on competition within a market, but may have little awareness of its potential effect on the public at large. Similarly, a politician may be fully briefed on the social significance of the merger and, yet, may struggle to comprehend the economic significance of competition. Neither an NCA nor a politician could undertake a truly effective balancing of each set of interests without being fully appreciative of the importance of each. It is essential that the decision-maker is fully informed of both the economic and social dimensions of a case, and that they afford a fair and unbiased reflection of each before arriving at a decision.

³¹ There is also the option for the state to appoint joint decision-makers that is compiled from among these three main institutions (NCAs, politicians and sector regulators).

This is, of course, easier said than done considering the subjective nature of the assessment process. Even when the competitive impact of a merger has been afforded an economic value, it is still left to the decision-maker to consider this value in relation to the social impact of the merger.

In relation to the constitutional legitimacy concern, let us consider the connotations of putting an NCA in a position where it must rule on matters in the public interest. The NCA may well afford a thorough examination to the likely impact of the merger on society, and it may well operate in genuine good faith to reach a decision that it truly considers to be in the best interests of the public. But is it constitutionally legitimate to have an unelected body, such as an NCA or a regulator, ruling on matters which are liable to have a direct impact on the public at large?³² From a democratic point of view, there is an argument for suggesting that these decisions are best left to a politician or group of politicians that have been elected by the public to represent their best interests at a national level.

The third concern regards regulatory capture, which all three of the aforementioned decision-makers are susceptible to, albeit to varying degrees. From a political science perspective, capture broadly refers to the circumstances where policy-makers or decision-makers are influenced to exercise their powers in a way that serves private interests; usually their own private interests or the interests of the firms they regulate. Capture can arise in several ways, including through direct lobbying by stakeholders, through confirmation bias, and via the so-called ‘revolving door’ phenomenon. Politicians are said to be particularly prone to lobbying from special interest groups, which carries the risk of politicians being enticed into applying public interest criteria in a way that stands to benefit only a small proportion of the electorate.³³ NCAs and

³² Gerbrandy and Polański refer to this as ‘the legitimacy-problem’ which has been afforded a notable amount of coverage in the political science literature; Anna Gerbrandy and Jan Polański, ‘Addressing the legitimacy-problem of competition authorities taking into account non-competition values’ (9th ACLE C&R Meeting, Amsterdam, December 2013) <<http://renforce.rebo.uu.nl/wp-content/uploads/2013/12/10-dec-Gerbrandy-and-Polanski-Addressing-the-legitimacy-problem1.pdf>> accessed 25 September 2015.

³³ Andreas Stephan, ‘Did Lloyds/HBOS mark the failure of an enduring economics-based system of merger regulation?’ (2011) 62(4) Northern Ireland Legal Quarterly 539, 551.

sector regulators are generally less susceptible to direct lobbying,³⁴ but they may be more prone to confirmation bias by affording disproportionate weight to their areas of specialist expertise. For example, in a merger between two newspapers that raises possible media plurality concerns, NCAs may be more inclined to afford priority to competition goals, whereas a media regulator may attach disproportionate consideration to plurality.³⁵ Moreover, all three types of decision-maker may be vulnerable to the ‘revolving doors’ concern. ‘Revolving doors’ can manifest itself in several ways. For example, NCAs and sector regulators frequently employ personnel with industry experience (who appreciate the unique attributes of the market and, as such, may be biased in favour of making decisions that benefit the industry, rather than the public at large).³⁶ Equally, one can envisage the prospect of politicians or senior civil servants exercising public interest criteria in order to serve their own personal career ambitions, either in terms of short-term political ambition (ie re-election),³⁷ or for future job prospects within an industry.³⁸ Critics of the use of public interest criteria have therefore suggested that these risks of regulatory capture should be neutralised by adopting a strict competition-based approach, where the decision-maker can only make its decision according to robust economic criteria.

In addition to the concerns relating to competence, constitutional legitimacy and capture under the ‘mixed’ approach, the practical costs of facilitating a merger regime

³⁴ This is mainly due to the fact that decision-making within NCAs and regulators is generally performed by groups of civil servants, rather than a single individual, which has the effect of limiting the influence that one biased individual can have on the final decision.

³⁵ See eg David Reader, ‘Does Ofcom Offer a Credible Solution to Bias in Media Public Interest Mergers in the United Kingdom?’ (2014) 4(1) CPI Antitrust Chronicle <<http://www.competitionpolicyinternational.com/does-ofcom-offer-a-credible-solution-to-bias-in-media-public-interest-mergers-in-the-united-kingdom>> accessed 25 September 2015.

³⁶ Per J. Agrell and Axel Gautier, ‘Rethinking regulatory capture’ in Joseph E. Harrington Jr and Yannis Katsoulacos (eds), *Recent Advances in the Analysis of Competition Policy and Regulation* (Edward Elgar 2012) 288.

³⁷ Stephan (n 33) 551.

³⁸ Peyer alludes to this in the controversial case of *E.on/Ruhrigas* where, having played a pivotal role in clearing the merger on public interest grounds, the German Minister for Economics later departed to become a manager in a firm that was part-owned by E.on; Sebastian Peyer, ‘E.on & Ruhrigas: Merging Competition and Industrial Policy’ in Barry Rodger (ed) *Landmark Cases in Competition Law: Around the World in Fourteen Stories* (Wolters Kluwer 2013) 141. See also Michael E. Levine and Jennifer L. Forrence, ‘Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis’ (1990) 6 *Journal of Law, Economics and Organization* 167.

that considers both competition and public interest goals is also a notable issue. Gerber has expressed his concern regarding the expanded role of national officials and judges in this decision making process, which he suggests ‘will increase uncertainty regarding [competition] goals’.³⁹ He believes the way in which the role of competition is perceived is likely to vary between different types of decision-makers and that ‘this will largely determine the direction of competition law development.’⁴⁰ This is an intriguing point as it suggests that, by allocating decision making powers to a variety of bodies, we risk distorting the meaning of ‘competition’ in the long-term. If different decision-making bodies have different ideologies on what constitutes the main goals of competition law and merger control, this may result in greater uncertainty within the system. This may well lead to a greater number of decisions being appealed by the merging parties, especially as these appeals could be based on public interest findings as well as competition. In addition, because of the large upfront costs associated with merger control, and the damaging effects that failed bids can have on share prices, a lack of legal certainty may also disincentivise mergers in a particular state.

2.4.2. The threat of protectionism

In the context of competition law enforcement, merger control is unique in terms of its potential to be used as an interventionist tool by governments to shape the internal structure of a market.⁴¹ As has been discussed above, state intervention on public interest grounds can offer an important degree of flexibility in the event of market failure. There are, however, a number of instances where states may strategically invoke public interest provisions for illegitimate purposes. For example, a national government may choose to block a pro-competitive cross-border merger for no other reason than to keep the domestic undertaking in domestic ownership. Furthermore, a state may wish to exploit the influence of the public interest by permitting an

³⁹ David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, Oxford 2001) xi.

⁴⁰ *ibid.*

⁴¹ McGowan and Cini thus describe merger control as ‘arguably the most potent weapon’ at the disposal of a decision-making body. Lee McGowan and Michelle Cini, ‘Discretion and Politicization in EU Competition Policy: The Case of Merger Control’ (1999) 12(2) *Governance: An International Journal of Policy and Administration* 175, 176.

anticompetitive merger between two domestic firms, so that the merged entity gains the economic power to compete on a global scale. This type of conduct can manifest itself through the creation of ‘national champions’ by national governments. Such an instance of forgoing competition concerns in favour of industrial policy is broadly known as ‘protectionism’. A protectionist act is not necessarily illegitimate, but a culture where states regularly afford favourable treatment to domestic undertakings, at the expense of foreign firms, can be extremely harmful to interstate trade and development of the global economy.

The benefit that a domestic state can derive from protectionism is very often mirrored by the harm it does to trading partners. When countries seek to protect their domestic firms, it has the effect of creating geographical barriers to entry which, in turn, can have an adverse effect on export and import trade. Protectionist measures also carry the risk of unforeseeable harm to the undertakings receiving protection. Motta, for example, suggests that national champions that have been artificially sheltered from competitive markets will struggle to compete effectively in global markets.⁴² He refers to competition policy as the best form of industrial policy and that ‘it is unlikely that firms in a particular industry are able to grow healthily if sheltered from competition’.⁴³ In other words, national governments may seek to reap the benefits of creating ‘national champions’ without considering the risk of sending an inefficient firm into the global marketplace prematurely. Indeed, for governments at least, this is often an unforeseen concern of affording scope to public interest criteria, as these firms may ultimately struggle to operate on a worldwide scale and are very much prone to failure as a result.

For these reasons, it is little wonder why protectionism represents one of the main concerns in relation to the consideration of public interest goals (and industrial policy goals, in particular) in merger control. However, several commentators are mindful of the potential benefits that can be realised by considering industrial policy in addition

⁴² Motta (n 14) 29.

⁴³ *ibid.*

to competition goals. Neven et al, for instance, suggest that the consideration of benefits other than those brought about by competition does not mean that competition is ‘systematically at odds with the goals of industrial policy’.⁴⁴ On the contrary, the authors propose that market failures are often best dealt with by adopting ‘well-conceived industrial policy interventions’ and that ‘[a]dopting a lax approach towards competition policy is at best an indirect and at worse a counterproductive response to such problems’.⁴⁵ The precise relationship between competition policy and industrial policy has long been debated, with industrial policy often portrayed as a complementary aid to competition enforcement. This is not necessarily the case, however, especially as the short-term goals of industrial policy (often applied by governments with fixed terms of office) will occasionally conflict with the long-term goals of competition. In these situations, decision-makers should exercise caution so as to avoid protectionist concerns.

2.4.3. Diluting the benefits of competition

A further concern regarding the consideration of public interest goals is that they have the effect of ‘diluting’ the benefits that can be realised under a strict competition-based approach to merger control. Alexander Schaub, a former Director General of DG COMP, emphasises the risk of detracting from the ultimate objectives of competition law by considering wider public interests, proposing that we should avoid becoming preoccupied with achieving public interest goals directly.⁴⁶ He suggests that issues such as ‘[j]ob creation or security cannot be a criterion for law enforcement because, in the long run, this could have exactly the opposite effect’.⁴⁷ Furthermore, Schaub warns against the prospect of overloading competition policy with ‘too many goals’, suggesting this would ultimately render competition policy ‘ineffective’.⁴⁸ The logic

⁴⁴ Damien Neven, Robin Nuttall and Paul Seabright, *Merger in Daylight: The Economics and Politics of European Merger Control* (Centre for Economic Policy Research 1993) 12.

⁴⁵ *ibid.*

⁴⁶ Alexander Schaub, ‘Working Paper VII’ in Claus Dieter Ehlermann and Laraine L Laudati (eds), *European Competition Law Annual 1997: The Objectives of Competition Policy* (Hart Publishing, Oxford 1998) 121.

⁴⁷ *ibid.*

⁴⁸ *ibid.* 126.

underpinning these statements is that the more goals a decision-maker is forced to consider, the less able he or she is to pursue optimal benefits for the main objective (for example, competition). In the long-term, if competition is to deliver the greatest overall benefits to society, albeit in the form of economic welfare, there is an argument for suggesting that competition should be the only assessment criteria in merger control.

In addition to the risk of undervaluing the benefits of competition, there is also the risk that decision-makers will place too great an emphasis on relatively minor public interest concerns that arise out of a merger. Pursuing both public interest and economic efficiency goals in tandem puts the decision-maker in a position where he or she cannot ‘see the wood for the trees’ when it comes to identifying which criteria should be afforded the greatest weight. A possible consequence of this is that public interest criteria prove overly influential in the decision-making process and, as a result, competition is inadvertently overlooked to a certain degree. In the context of antitrust remedies in the United States, some commentators have suggested that considering public interest goals actually leads to the enrichment, rather than the dilution of antitrust law, given that they allow for precedent to be developed.⁴⁹ However, given the case-by-case nature of merger assessment in most jurisdictions, it is unlikely that this benefit will be realised in this context. As such, those who advocate for a strict competition-based approach to merger control will often refer to the benefits of being single-minded in the effective pursuit of a single long-term objective.

2.4.4. The impact on legal certainty

The importance of legal certainty and predictability cannot be underestimated in the context of merger control. Firms are liable to bear large upfront costs when attempting to merge, and these firms must be confident that their transaction will be subjected to

⁴⁹ Leonard J Emmeglick, ‘Proposals for balancing all public interests in fashioning antitrust remedies’ (1962) 21 *Antitrust Law Journal* 387, 390.

a consistent and predictable assessment process. Mergers can provide a number of pro-competitive benefits relating to efficiencies, so it would be undesirable for states to discourage mergers by adopting arbitrary assessment criteria. This illustrates another of the key concerns associated with incorporating public interest criteria into merger assessments. To maximise legal certainty in a regime that considers public interest criteria, decision-makers will need to assess mergers against these criteria on a case-by-case basis, while attempting to remain both consistent and transparent in their reasoning. Guidelines and case law can facilitate a degree of consistency between decisions,⁵⁰ but the subjectivity that is inherent in any assessment of the public interest means lingering doubts are likely to remain in the minds of the merging parties. This is evident from a 2005 study by the ICN which found that, of its members who that had chosen to incorporate public interest factors into their merger assessments, forty-two per cent had failed to do so transparently; namely, by failing to explain adequately how public interest considerations ‘interface with other substantive aspects of the merger review regime’.⁵¹ These results clearly give weight to calls made by the former EU Competition Commissioner Mario Monti in 2002, who said it is ‘crucial that any public interest criteria should be clearly spelt out in the law, and that those criteria should be applied in a predictable, transparent and objective manner’.⁵² It is therefore reasonable to assume that a merger regime that is based solely on the assessment of economic criteria will be in a position to facilitate legal certainty more readily.

Many jurisdictions have adopted a predominantly competition-based approach to merger control, owing to the robustness and predictability it affords. Where the same

⁵⁰ Indeed, the International Competition Network (ICN) has put forward recommendations which, *inter alia*, urge transparency regarding the way in which public interest considerations interact with competition-based criteria under the merger regimes of its members. International Competition Network, ‘Recommended Practices for Merger Notification Procedures’ (2002) 23 <<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>> accessed 25 September 2015.

⁵¹ J William Rowley and A Neil Campbell, ‘Implementation of the ICN’s Recommended Merger Practices: A Work-in-(Early)-Progress’ (July 2005) *The Antitrust Source* <http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jul05_Rowley7_28f.authcheckdam.pdf> accessed 25 September 2015.

⁵² Mario Monti, ‘Analytical Framework of merger review’ (International Competition Network Inaugural Conference, Naples, September 2002) <http://europa.eu/rapid/press-release_SPEECH-02-473_en.pdf> accessed 25 September 2015.

economic rules and theories are consistently applied in every merger assessment, parties to a prospective merger are able to predict the likelihood of a successful transaction at an early stage. Including public interest criteria within the assessment creates the possibility that mergers will be blocked on unpredictable public interest grounds, which has knock-on implications for legal certainty. A regime which lacks certainty and predictability is likely to see a reduction in merger activity, as the parties themselves lack confidence in the success of their ventures.⁵³ In the European Union, it is widely acknowledged the European Commission's decision to adopt a more economic competition-based approach to merger control has come as a response to criticism aimed at its somewhat inconsistent decision-making.⁵⁴ As such, it can be said with some conviction that consistency and, in turn, predictability between decisions are more likely to be realised under a strict competition-based approach that is reinforced by intuitive economic tools.

2.4.5. Remarks on the concerns of considering public interest criteria

In light of these concerns, it is clear why public interest considerations have been viewed with such scepticism within the context of merger control. This scepticism has now made the competition-based approach the orthodox position with regards to merger control in most jurisdictions.⁵⁵ It is interesting, however, to note the contents of this 'anti-public interest' rhetoric, as it possibly provides an explanation for how the competition-based approach, rather than the 'mixed' approach, has become the norm. Simply put, this rhetoric can be said to contain two distinct voices: (i) the positive voice, which champions the strict competition-based approach based on its ability to maximise economic efficiencies and welfare, and (ii) the negative voice,

⁵³ The economic efficiencies which can arise from a merger means that a regime which discourages mergers – albeit inadvertently – risks hindering welfare enhancements.

⁵⁴ Arndt Christiansen, 'The "more economic approach" in EU merger control' (2006) 1 CESifo Forum 34 <<http://www.cesifo-group.de/portal/pls/portal/docs/1/1191686.PDF>> accessed 25 September 2015. Indeed, there is also evidence to suggest that the European Commission's move towards a competition effects-based approach has coincided 'with an increase in the economic content and quality of merger assessments'; Claes Bengtsson, Josep M Carpi and Anthony Whelan, 'Part 4 – The substantive assessment of mergers' in Götz Drauz and Christopher Jones (eds), *EU Competition Law: Mergers and Acquisitions* (Volume II, 2 edn, Claeys & Casteels 2012) 309.

⁵⁵ See Chapter 5 for empirical insights on this.

which condemns the ‘mixed’ approach by emphasising the concerns raised by public interest considerations. The latter negative voice is of particular note as, in essence, it seeks to support the adoption of a strict competition-based approach by discrediting the ‘mixed’ approach as a viable alternative. If the ‘mixed’ approach were considered a viable alternative, then the negative voice would be muted. This exposes the positive voice to greater scrutiny with regards to the legitimacy of assessing a merger without considering their potential impact on wider society. Whether the ‘mixed’ approach will be perceived as a credible alternative to a competition-based approach in the future remains to be seen. But it is clear that the negative voice would have to be silenced for this to happen.

2.5. CONCLUDING REMARKS

The purpose of this chapter has been to set the scene for the thesis by providing a brief overview of the main points of discussion regarding the role of the public interest in merger control. In doing so, it has provided a definition for the ‘public interest’ that will be applied throughout this thesis. It also draws several conclusions on the abstract notion of the public interest that should be borne in mind in the forthcoming chapters. In particular, it identifies that – although competition and public interest goals are compatible in the vast majority of cases – a ‘mixed’ approach to merger assessment will inherently involve trade-offs between the two sets of goals. Undertaking this trade-off is fraught with practical and constitutional concerns that have fuelled a prominent ‘anti-public interest’ rhetoric in the literature. These concerns, which have been afforded brief reference here for introductory purposes, will be explored at various intervals throughout this thesis. Indeed, Chapters 3 and 4, which consider the role of the public interest in the EU and UK merger regimes respectively, will each provide insights into how these concerns have manifested in practice, and what measures have been put in place in an effort to alleviate them.

CHAPTER 3

To what extent do Public Interest Goals Influence European Merger Investigations?†

3.1. INTRODUCTION

The extent to which public interest goals can be said to influence European Union merger assessments is contestable. On the one hand, the modernisation of EU competition law has attributed significant emphasis to pursuing a ‘consumer welfare’ objective,¹ rather than any specific public interest goals. On the other hand, there remains scope – and, arguably, a requirement – for public interest goals to be considered by the European Commission (hereafter, ‘the Commission’) under the EU Merger Regulation (EUMR),² as well as under the Treaty itself.³ We might therefore seek to examine the extent to which these wider public interest goals can and have influenced EU merger assessments in practice.

In the shadow of a consumer welfare imperative, how can public interest considerations be said to retain an influence in EU merger control? Firstly, a great deal of potential influence can stem from the unique characteristics of the EU as a supranational entity, which seeks to serve the interests of the Union as a whole. Secondly, we can consider the EU as a collection of individual Member States, that – within the confines of EU competition law – are entitled to protect their legitimate

† For their valuable feedback on an earlier version of this chapter, the author would like to thank the participants of the 7th Competition Law and Economics European Network Workshop (Bergen), and the 5th Annual UEA Law Research Colloquium (Norwich).

¹ Although consumer welfare is not the only goal of EU competition law, as this chapter will allude to, Regulation 1/2003 has increased the attention that is now afforded to it in practice; KJ Cseres, ‘The Impact of Regulation 1/2003 in the New Member States’ (2010) 6(2) Competition Law Review 145, 160.

² Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EU Merger Regulation) [2004] OJ L24/1.

³ Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/47. Hereafter, ‘the TFEU’.

national (public) interests under certain circumstances. These two inherent dimensions of the EU present their own challenges to the Commission's enforcement of merger control, namely with regard to enabling Member States to protect their legitimate public interests while, at the same time, ensuring that the interests of the EU as a whole are not eroded as a consequence.⁴ Yet, in spite of the practical dilemmas associated with considering the public interest in addition to consumer welfare goals, there also exists an argument with a constitutional basis – one that suggests the Commission has a legislative duty to at least take steps towards giving effect to the wider objectives of the Treaty wherever possible. If the EUMR affords scope for the Commission to consider such objectives, one would anticipate issues of constitutional legitimacy to arise if the Commission then failed to give effect to these when undertaking merger assessments.

This chapter seeks to establish the type of approach that EU merger control most identifies with and, therein, the extent to which this approach allows public interest goals to influence the outcomes of merger investigations. It does so by drawing insights from four avenues of enquiry in this area of enforcement. Section 3.2 briefly introduces the Commission's substantive approach to merger enforcement and explores the unique interaction that exists between competition and public interest objectives within this supranational framework. It finds that, although the substantive test for assessment under the EUMR lays the foundations for the Commission to adopt a strict competition-based approach, policy-linking clauses in the European Treaties and the EUMR itself afford potential scope for the Commission to consider wider public interest factors. Section 3.3 identifies some of the challenges associated with considering public interest criteria within a supranational merger regime, and whether these challenges can justify the Commission's exclusion of public interest considerations in its assessment procedure. It concludes that, despite the challenges it is faced with, any decision by the Commission to overlook wider public interest

⁴ This is a dilemma that the Commission itself has been mindful of; see Joaquín Almunia, 'EU merger control has come of age' ('Merger Regulation in the EU after 20 years', Brussels, March 2011) <http://europa.eu/rapid/press-release_SPEECH-11-166_en.htm?locale=en> accessed 25 September 2015.

concerns raises a significant constitutional concern, by placing procedural norms ahead of substantive norms. Section 3.4 presents a detailed account of the observable scope that the Commission can afford – and has afforded – to public interest considerations in practice. It finds that, in the most part, the Commission has demonstrated a continued reluctance to give effect to public interest considerations in its merger assessments, by choosing not to act on the policy-linking clauses under the Treaties and the EUMR. Section 3.5 evaluates the potential that remains for public interest considerations to enter into the European arena ‘via the back door’ by virtue of Article 21(4) EUMR, and the power it affords to Member States to apply to intervene in EU-level mergers that affect legitimate national interests. It reveals a chequered history of Article 21(4), where abuses by Member States have seemingly led the Commission to treat applications under the provision with immense suspicion; thus, restricting its potential to allow public interest considerations to enter the assessment process. Section 3.6 provides concluding remarks.

3.2. MERGER CONTROL AND THE PUBLIC INTEREST IN THE EU

3.2.1. A ‘public interest’ for the European Union?

The legal framework of the EU is unique in terms of its supranational dimension and the hard law that binds its members to a unified economic policy. The concept of uniting the individual interests of twenty-eight Member States – each with its own social and economic ideologies – under an EU-level umbrella is difficult to comprehend and, of course, is the reason why the EU subsists as a both a supranational entity and a collection of separate national laws. Consider then the practical and political constraints that would accompany the task of defining a universal definition of the public interest for Europe.⁵ The task would seem difficult enough at a domestic level, where commentators have observed the need to define the public interest in terms of the social, political and even historical features that are most reflective of the

⁵ In contrast to the definition of the ‘public interest’ that Chapter 2 outlined for the purposes of this thesis, an EU definition would seemingly require a precise statement of what factors were considered to be ‘in the public interest’ in the EU context.

state.⁶ At an EU level, the thought of framing a single definition that is able to encapsulate the separate – and often conflicting – ideologies of each Member State would appear to be an impossible task.⁷ Putting to one side the definition of the ‘public interest’ that was presented in Chapter 2, what do we actually mean when we refer to the ‘public interest’ in the EU context? In seeking to answer this, one should focus less on the divergence between Member State policies and, instead, concentrate on the EU policies that unite them. Competition policy is a prime example. The rationale behind EU competition policy is widely regarded to be a combination of maximising consumer welfare and creating a single market for trade.⁸ Both consumer welfare and the Single Market are imperative to the European Commission which, as is shown below, considers competition to be an essential tool in which to achieve these ends. Upon ratifying the EU Treaty, each Member State accepts that its domestic merger transactions are to be subject to EU competition law whenever the transaction has a Union dimension. Furthermore, the Member State accepts that each of these transactions shall be assessed by the Commission with competition criteria in mind. So whether or not the Commission’s competition-based approach is mirrored in their own national laws, all Member States are united in accepting that competition reigns supreme at EU level.

3.2.2. The EU approach to merger control enforcement

Although there is no per se ‘right’ or ‘wrong’ way to approach merger control, it stands to reason – as a minimum expectation – that merger control should seek to achieve the objective(s) expected of it. Some merger control regimes may intend to achieve a number of objectives, in which case they may make use of several types of assessment

⁶ Stephen Wilks, *In the Public Interest: Competition policy and the Monopolies and Mergers Commission* (Manchester University Press 1999) 19.

⁷ This is especially true given the accession procedure for new Member States, who would be forced to change their historical perception of the public interest in order to ratify the Treaty.

⁸ Ioannis Lianos, ‘Some Reflections on the Question of the Goals of EU Competition Law’ (2013) CLES Working Paper 3/2013 <<https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-3-2013>> accessed 20 September 2015.

criteria in order to take these objectives into account.⁹ Other merger regimes may be framed around a single core objective and, as such, the assessment criteria will relate solely to achieving that core purpose. What is less apparent is how to frame a merger regime that seeks to achieve a core fundamental objective but that also wishes to give effect to a number of intermediary objectives. This is one of the main difficulties observed in the EU context. Of course, the ideal scenario would be to achieve a number of intermediary objectives while in no way compromising the attainment of the fundamental objective. In the EU, for example, assessments could be undertaken in the pursuit of maximising consumer welfare but may also consider wider public interest goals where possible. But, as has been alluded to in Chapter 2, the concern exists for intermediary objectives to have a diluting effect on the pursuance of core objectives, such as competition (and, in turn, consumer welfare).

Before we address the European Commission's approach to merger control, let us first consider the EU's domestic scene – which perhaps offers a more nuanced account of the various substantive approaches to merger control. Referring back to the spectrum of approaches that was illustrated in *Figure 1* of the previous chapter, it is notable that every EU Member State now adopts a 'strict' competition-based approach to merger control.¹⁰ Each of these approaches is founded upon an effects-based substantive test, so-called because they assess whether the likely effect of the merger will be to impede or reduce competition within the relevant market. As one of these substantive tests has been adopted in every Member State, they offer a key insight into the extent to which public interest goals are able to influence merger decisions in the European context, albeit not at EU-level specifically.

The three main substantive tests that have found prevalence among the EU Member States are the 'significant impediment to effective competition' (SIEC) test, the 'substantial lessening of competition' (SLC) test, and the dominance-based test. Each

⁹ If these objectives include both competition and public interest goals, this may resemble the 'mixed' approach that was described in Chapter 2.

¹⁰ Of the 28 EU Member States, 11 adopt an SIEC test, 4 adopt an SLC test, and 12 adopt a dominance-based test. The one exception is Luxembourg that does enforce formal merger control laws. See Appendix 10.

test is based entirely on economic criteria and affords no direct scope for public interest goals to be considered under the default assessment. Yet, despite the economic nature of all three, some of these tests may be considered ‘more economic’ than others.

The dominance-based test, for example, takes inspiration from Article 102 TFEU by inferring that a transaction is anti-competitive when it has the effect of creating or strengthening a dominant position in a given market. Although the criterion itself is economic, establishing what constitutes a ‘dominant position’ for these purposes relies more on economic theory than on economic modelling. As has been the case in the context of Article 102, market shares have often been used as a proxy for assuming dominance, even though dominance has been attributed to firms with broad-ranging market shares in a number of Article 102 investigations. The dominance-based test can only therefore be said to offer a ‘proxied’ economic assessment of merger transactions. The SIEC and SLC tests, on the other hand, tend to be led by what is considered a pure economic assessment, one which considers the effect of mergers on competition to determine the overall impact on consumer surplus. Instead of using ‘dominance’ as the main indicator of harm, the legitimacy of a merger is judged by whether it is likely to ‘significantly impede’ or ‘substantially lessen’ competition within the relevant market.

These substantive tests for assessment may also present an interesting insight into the evolution of merger control at EU level. There is a prominent view in the academic literature that EU competition law has its origins in the ordoliberal school of thought.¹¹ There have been divergent interpretations of precisely what the ordoliberal approach entails but, in its fundamental form, the goals of ordoliberalism are rooted in the pursuit of individual freedom and protection of the competitive process.¹² As academic scholars have noted, the debate surrounding the influence of ordoliberal thinking on EU competition law has itself been clouded by apparent misconceptions

¹¹ For a useful overview of this literature, see Pinar Akman, *The Concept of Abuse in EU Competition Law: Law and Economic Approaches* (Oxford, Hart 2012) 55.

¹² Ignacio Herrera Anchustegui, ‘Competition Law through an Ordoliberal Lens’ (2015) 2(2) Oslo Law Review 139, 139.

regarding (i) the precise definition of the ordoliberal school of thought,¹³ and (ii) its development over time.¹⁴ In his seminal work on the subject, David Gerber suggests that the structure of EU competition law closely resembles ordoliberal thought, particularly with regards to Articles 101 and 102 TFEU.¹⁵ In contrast, Akman, citing the ordoliberal belief that monopoly is harmful in itself, suggests that the Treaty drafters would have inserted an outright prohibition on dominance in Article 102, had they been influenced by ordoliberal thinking.¹⁶ Further still, Akman's interpretation has itself been scrutinised for being too narrowly focussed on the negotiations surrounding the Treaty and the Articles relating to competition.¹⁷ In addition to the fact that EU merger control was initially enforced under Article 102 in the absence of a formal merger regulation,¹⁸ this debate is notable for two reasons in the context of EU merger control: (i) because of the EU's decision to move from a dominance-based test under the ECMR,¹⁹ to an SIEC test under the EUMR, and (ii) because of the continued reference to 'dominance' within the EUMR's SIEC test.

¹³ *ibid* 164.

¹⁴ For an excellent account of the evolution of ordoliberal thinking in the context of Article 102 TFEU, see Peter Behrens, 'The Ordoliberal Concept of 'Abuse' of a Dominant Position and its Impact on Article 102 TFEU' (10th ASCOLA Conference, Tokyo, May 2015) <<http://ssrn.com/abstract=2658045>> accessed 31 May 2016.

¹⁵ David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP 2001) 264.

¹⁶ Pinar Akman, 'Searching for the Long-Lost Soul of Article 82EC' (2009) 29(2) *Oxford Journal of Legal Studies* 267, 271.

¹⁷ Lorenzo Federico Pace and Katja Seidel, 'The Drafting and the Role of Regulation 17: A Hard-Fought Compromise' in Kiran Klaus Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (OUP 2013) 56.

¹⁸ In 1966, the Commission published a memorandum which suggested that Article 86 of the EEC Treaty could be applied to merger transactions that amounted to an abuse of a pre-existing dominant position; European Commission, 'The problem of industrial concentration in the Common Market' (Memorandum) Competition Series No 3 (1966); English language translation available in Frank L Fine, *Mergers and Joint Ventures in Europe: The Law and Policy of the EEC* (Graham & Trotman 1989), Annex G. This was later confirmed by the European Court of Justice in *Continental Can*; Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission of the European Communities* [1973] ECR 215. See also the *Philip Morris* case, for an account of assessing mergers under Article 86 EEC; Joined Cases C-142 and 156/84 *British American Tobacco Ltd v Commission and RJ Reynolds Inc v Commission* [1987] ECR 4487.

¹⁹ Council Regulation (EEC) 4064/89 on the control of concentrations between undertakings (EC Merger Regulation) [1989] OJ C22/16, art 2.

The European Commission currently utilises the SIEC test is by virtue of Article 2 EUMR. In particular, paragraph 3 provides that:

A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

Evidently, the wording of the test continues to allude to ‘the creation or strengthening of a dominant position’, which features so prominently under the dominance-based test. It is only afforded a secondary mention as a potential example of a significant impediment but, nevertheless, appears to confirm that there is a role for dominance – as well as its market share proxies – within the substantive assessment process. Therefore, although a move from a dominance-based test to an SIEC test is representative of a move towards a ‘more economic approach’ to merger control in principle, the retained presence of ‘dominance’ in the Commission’s SIEC test would seem to suggest that it falls short of a ‘pure economic test’. As Behrens notes, this ‘more economic approach’ is at odds with ordoliberal thought, particularly in the sense that it places greater emphasis on a welfare-based test that measures consumer harm, rather than a formalistic approach that places particular value on market shares.²⁰ The former European Commissioner for Competition, Joaquín Almunia, has defended the economic robustness of the SIEC test adopted under the EUMR,²¹ but the merger guidelines continue to afford advice on the use of market shares as part of the substantive assessment. How the SIEC test has been seen to operate as part of the Commission’s wider competition-based approach to merger control is considered

²⁰ Peter Behrens, ‘The ‘Consumer Choice’ Paradigm in German Ordoliberalism and its Impact upon EU Competition Law’ (2014) Europa-Kolleg Hamburg Discussion Paper No. 1/14, 29 <<http://ssrn.com/abstract=2568304>> accessed 31 May 2016.

²¹ Almunia has insisted that the 2004 horizontal guidelines and the 2008 vertical guidelines introduced a merger review process that ‘is now focused more on how a merger can affect the competitive dynamics of markets and less on structural aspects such as concentration levels and market shares.’ Joaquín Almunia, ‘Merger review: Past evolution and future prospects’ (Conference on Competition Policy, Law and Economics, Cernobbio (Italy), November 2012) <http://europa.eu/rapid/press-release_SPEECH-12-773_en.htm> accessed 25 September 2015.

under Section 3.4 of this chapter. However, the evolution of the substantive test is not wholly indicative of the role that public interest considerations play in EU merger assessments, namely because both the dominance-based and SIEC tests are based on either competition or welfare (values that fall outside of the definition of ‘public interest’ that we set out in Chapter 2). But just as the Commission appears to have moved towards a more economics-based approach in terms of its substantive merger assessments, we might ask whether this has had ramifications for the role of the public interest in the EU context.

In the light of the concerns associated with considering public interest criteria in merger assessments, as has been detailed in Chapter 2, it is perhaps understandable that the Commission has attempted to circumvent these concerns altogether, by adopting a strict competition-based approach to merger evaluation. In turn, merger assessments that are based solely on the impact that a transaction has on competition has become the orthodox position across and within the EU. This modern-day reality could have been very different, however. The 1973 proposals for a European Merger Regulation appear to tend towards a preference for a regime that resembled the UK merger regime of the time;²² namely, a system which included the consideration of public interest concerns alongside competition criteria. Indeed, under the revised proposals of 1988,²³ the Commission included a direct reference to what would amount to a public interest exemption under the Regulation. A defence would be allowed on the grounds that:

improving production and distribution [...] promoting technical or economic progress or [...] improving the competitive structure within the market outweighs the damage to competition. In this respect the competitiveness of sectors [...] and the interests of consumers shall be taken into account.²⁴

²² European Commission, ‘Proposal for a Regulation (EEC) of the Council on the control of concentrations between undertakings’ [1973] OJ C92/1.

²³ European Commission, ‘Amended proposal for a Council Regulation (EEC) on the control of concentrations between undertakings’ [1989] OJ C22/14.

²⁴ *ibid* C22/16.

It was, however, the opposition from the German contingent which led the Commission to reconsider the role of public interest at EU level – with Germany regarding the prospect of Community level mergers being assessed on public interest grounds as a primitive version of its own ‘more economic approach’ at domestic level. In any case, by the late-1980s the UK had itself converged towards a more competition-oriented assessment procedure and, as such, interest in accommodating public interest criteria under the Merger Regulation began to wane. France were, however, keen for a public interest exemption to be incorporated into the 1989 Regulation for reasons relating to industrial policy and, furthermore, Italy, Spain and Portugal also supported the inclusion of the provision on grounds of regional policy.²⁵ Despite the fact that no such provision made the final version of the ECMR, Bulmer rightly notes that ‘the balance between competition and public interest/efficiency criteria in the [ECMR] was influenced significantly by the process of consensus building in the Council of Ministers’.²⁶

Given the Commission’s adoption of a strict effects-based test under the EUMR, one could be forgiven for doubting the influence of any public interest goals in EU merger control. That said, there are a few public interest issues that have been considered relevant as a result of wider EU policy, and their relevance is even more compelling in light of the Commission’s convergence towards a strict economic approach. As such, it is interesting to consider how public interest and competition goals interact under the EU environment.

3.2.3. The interaction between public interest and competition goals in the EU

As aforementioned in Chapter 2, the importance attributed to specific public interest factors is subject to change, depending on the economic climate and the social perceptions at any particular time. Nevertheless, a few of these interests are attributed

²⁵ Simon Bulmer, ‘Institutions and Policy Change in the European Communities: The Case of Merger Control’ (1994) 72(3) *Comparative and International Administration* 423, 437.

²⁶ *ibid* 439.

particular prominence in the EU context, and are never far from the Commission's agenda. In contrast, other public interests are generally overlooked for a variety of reasons, including issues of conflict with other EU policies. It is worth exploring a few of these public interest factors and to consider how and why they might be considered alongside competition goals.

The environment represents a particularly sensitive issue among Member States and the Commission. The scale to which a single merger can have an impact upon the environment is unclear, but one can envisage, for example, a merger between two firms that mine for natural resources that are used for the supply of energy. The merger may well allow for economies of scale and scope that may benefit provide benefits to consumers in the form of lower prices, but these operating efficiencies may lead to the large-scale destruction of land and natural habitats. Monti suggests that environmental concerns are capable of taking precedent over competition concerns where a cost-benefit analysis is undertaken, in line with the Commission's *Guidelines on Horizontal Agreements*.²⁷ He also suggests that the wording of the TFEU may afford scope to environmental protection issues, particularly in relation to Article 11 which confers upon the Commission a duty to incorporate environmental protection into each of its policy areas.²⁸ This statement is intriguing given that Monti considers it as a means by which to justify anticompetitive mergers that are likely to benefit the environment. It is one thing to suggest that the Commission may block a pro-competitive merger on public interest grounds, but in what instances would the Commission – seemingly so committed to competition objectives – permit an anticompetitive merger for the same reasons? In relation to EU competition law in its broad sense, case law shows that this is not as far-fetched as it might appear. The Article 101 case of *CECED* saw the Commission clear an otherwise anticompetitive agreement on the grounds that it offered wider benefits to society in environmental

²⁷ Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to Horizontal Co-operation Agreements [2001] OJ C 3/2.

²⁸ Giorgio Monti, *EC Competition Law* (Cambridge University Press 2007) 92.

terms.²⁹ As Monti observes,³⁰ this is also afforded express mention within the context of merger control under the *Horizontal Guidelines* where the Commission has forwarded that it will exempt otherwise illegitimate agreements which ‘reduce economic pressure’ so long as the ‘net contribution to the improvement of the environment situation overall outweighs increased costs’.³¹ The importance attributed to the environment by the Commission is therefore wholly apparent given that it is prepared to forgo its consumer welfare imperative by allowing anticompetitive mergers to proceed. How many mergers of this kind will actually materialise is debatable, but modern-day pressures on our climate may increase the significance of this policy ground in the coming years. What is clear is that the Commission is at least able, in principle at least, to depart from its default competition-based approach where it attaches particular importance to the public interest in question.

One of the more controversial public interest categories at EU level is industrial policy. This encompasses a broad range of measures which are applied, occasionally in the face of competition, to strategically manage the ownership or ensure the stability of firms in important economic sectors. In the domestic sense, Motta suggests that industrial policy measures may be used by domestic governments to adopt a lax approach to competition in order to support so-called ‘national champions’ or to break up ‘foreign champions’.³² The special treatment afforded by the government allows these champions to become dominant in their market and often provides the firm with the economies of scale on which to operate at a global level. For example, a large domestic car manufacturer may be subject to a takeover bid from a rival manufacturer from abroad. The merger may not evoke any anticompetitive concerns, but the government may attach particular importance to the national identity or economic standing of the domestic manufacturer. If it is felt that the national economy would benefit from retaining the manufacturer in domestic ownership, the government may well wish to block the merger on industrial policy grounds. Equally, governments may

²⁹ *CECED* (Case IV.F.1/36.718) Commission Decision 2000/475/EC [1999] OJ L187/47.

³⁰ Monti (n 28) 92.

³¹ *Horizontal Guidelines* (n 27) para 198.

³² Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 28.

wish to retain domestic ownership over firms in sectors of high national or strategic significance; for instance, in the water and agricultural industries. To this end, industrial policy can certainly provide the flexibility that competition policy often fails to deliver. If implemented correctly, industrial policy measures can lead to a number of benefits for the economy and society at large.³³ Moreover, because industrial policy measures – which may themselves take the form of mergers – have the potential to directly reshape the structure of a market, the benefits of the measures can be realised in the short and mid-term.³⁴ Given the likely benefits on offer, some commentators place particular emphasis on the role of industrial policy over all other public interests. Schwartz, for example, goes as far as to suggest that the matter at issue is not whether the Commission should be pursuing a policy based on a combination of competition and public interest criteria but, more specifically, a combination of competition and industrial policy criteria.³⁵

Environmental and industrial policy goals are just two examples of public interest considerations that may interact with competition goals in practice. There are, however, a countless number of possible scenarios where the public interest may be seen to influence a merger decision. *Table 1* considers how a selection of public interest concerns may be able to, on the one hand, justify the clearance of an anticompetitive merger and, on the other hand, justify blocking a pro-competitive merger.

³³ Jones and Sufrin, for example, note the potential for industrial policy measures to be implemented in order to allow domestic undertakings to compete in global markets, as well as to ‘encourage cross-border concentration, to encourage technical progress, to protect certain industries, or to protect employment’. Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (4th edn, OUP 2010) 964.

³⁴ Townley, for example, notes how short-term industrial policy measures can alleviate problems that are often associated with consumer welfare pursuits, eg in relation to sub-optimal investment in research and development. Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing, Oxford 2009) 23.

³⁵ Ethan Schwartz, ‘Politics as Usual: The History of European Community Merger Control’ (1993) 18 *Yale Journal of International Law* 607, 611.

Table 1. How specific public interest grounds could hypothetically justify clearing or blocking a merger under EU merger control.

Public interest	Justifications for clearing anticompetitive merger	Justifications for blocking procompetitive merger	Source of relevance under EU law
Employment	The merger is anticompetitive but will guarantee the jobs of a firm threatened with insolvency.	Merger would likely lead to a ‘consolidation of resources’ leading to redundancies	Articles 9 and 147 TFEU Article 3(3) TEU
Environmental protection	Merger is anticompetitive but enables firms to pull resources in the manufacturing process, which will significantly reduce CO ₂ emissions.	Merger would lead to a destruction of natural habitat, or would result in, for example, a fossil fuel refiner obtaining a patent for innovative green energy technology.	Article 11 TFEU Article 191 TFEU
Financial stability	Merger is anticompetitive but will prevent the collapse of an insolvent bank, which would destabilise the wider economy.	The merger, although pro-competitive, would result in the merged financial service becoming ‘too big to fail’, ie its collapse would pose catastrophic consequences to the wider economy.	Stability and Growth Pact ³⁶ Articles 127 and 141 TFEU Article 21(4) EUMR
Industrial policy	Merger is anticompetitive but would facilitate a “European champion”, which shall trade on the global market to the benefit of the EU economy.	Merger is pro-competitive but would lead to a “European champion” falling into foreign ownership, to the detriment of the EU economy.	eg Communication on ‘An integrated industrial policy for the globalisation era’. ³⁷

³⁶ Commission, ‘Resolution of the European Council on the Stability and Growth Pact’ (2007) OJ C236.

³⁷ Commission, ‘Communication from the Commission to the European Parliament, the Council, the Council, the European Economic and Social Committee and Committee of the Regions: An integrated industrial policy for the globalisation era – putting competitiveness and sustainability at centre stage’ COM (2010) 614 final.

Media plurality	Merger is anticompetitive but would result in a less conventional media ‘voice’ receiving an audience share that is more akin to mainstream voices.	Merger would likely lead to the news media being concentrated between a handful of owners, potentially compromising democracy.	Article 167 TFEU Article 21(4) EUMR
Public health	Merger is anticompetitive but is likely to ensure the future of a leading research hospital or a hospital that possesses an essential facility within a geographic region.	Merger would likely lead to the relocation of healthcare services, meaning patients in a particular geographic region may be without local healthcare.	Article 168 TFEU
National security	Merger is anticompetitive but will ensure the immediate safety of citizens in a period where the outbreak of conflict is a high possibility.	Merger would lead to the ownership of a munitions provider moving into the hands of a firm from a country that has political strains with the host country.	Article 346 TFEU Recital 19 and Article 21(4) EUMR

These are just a few examples of the types of public interest factors that may have a role to play in merger assessments and, again, the relevance of each shall vary according to which jurisdiction the assessment is taking place. These interests may, for instance, be considered relevant within the EU jurisdiction by virtue of the wider policy objectives referred to under the TFEU.

If we consider Article 7 of the TFEU, requirements are imposed on the EU to ‘ensure consistency between its policies and activities, taking all of its objectives into account’. On its literal interpretation, this would appear to confer a duty upon the Commission to consider the wider policy goals of the EU when pursuing individual

policies, including competition policy. The essence of Article 7 is given effect to by the numerous cross-sectional or policy-linking clauses present under the Treaty; several of which are referred to in the right-hand column of *Table 1*. Each of these policy-linking clauses seeks to expand upon the premise of Article 7 by indicating the individual factors that should be considered in each policy area. For example, Article 346 of the TFEU establishes a solid basis on which a Member State may take measures to protect its national security, particularly in relation to trade in arms and information disclosure.³⁸ In terms of environment protection, Article 11 TFEU acts as the policy-linking provision, allowing Article 191 to outline the specific need for EU environmental policy to contribute towards protecting the quality of the environment and combating climate change. And employment policy assigns the Commission the broad objective of promoting ‘a high level of employment’ while implementing its other policies. Read alongside Article 7, these policy-linking clauses place public interest concerns at the forefront of the Commission’s decision making process. Some of these interests may, however, be perceived as inherently more important by the Commission. Of the public interest concerns listed in the table, ‘public health’ and ‘national security’ could be considered most important given that they directly relate to the mortality of EU citizens. Having said this, the Commission may consider these to be concerns that are best addressed by the individual governments of Member States. It might therefore focus its efforts on aligning domestic policies in areas that are less national-specific; with the Commission’s pursuit of a common EU environmental policy representing a good example of this.

It is interesting to note that *Table 1* also illustrates how public interest concerns may be used positively to permit an anticompetitive merger and, also, negatively to block a procompetitive merger. These are the two ways in which public interest considerations can influence a merger assessment, and different jurisdictions will often apply different rules depending on whether the public interest criteria is applied

³⁸ Although, Article 346(1)(b) expressly decrees that any measures to manage the production or trade of arms should not adversely affect competition in markets for non-military-based products.

positively or negatively.³⁹ The positive application, in particular, is analogous to the so-called ‘efficiency defence’, that also operates under the majority of merger regimes. Under the efficiency defence, a merger that is found to have anticompetitive effects may nevertheless be permitted on the grounds that it is likely to bring about efficiency gains that will offset the loss of competition. This is based on the premise that a merged firm – which has derived economies of scope and/or scale from its merger – will be able to cut its production costs and, thus, offer its goods to consumers at a reduced price. This means that, despite the loss of competition resulting from the merger, consumer welfare is actually enhanced by way of productive and allocative efficiency.

Under the EU merger regime, scope is afforded to the Commission to consider an efficiency defence by virtue of Recital 29 EUMR. The *Horizontal Merger Guidelines* outline the criteria to be applied when utilising the efficiency defence,⁴⁰ stating that the Commission shall only consider efficiencies if: (1) they provide a benefit to consumers,⁴¹ (2) they arise specifically out of the merger in question, and (3) they are verifiable and likely to be realised. There are, however, two main characteristics in which the public interest defence differs from the efficiency defence. These differences are arguably why a public interest defence cannot be transplanted into the EU merger regime in parallel to the efficiency defence provisions. The first difference relates to *who* receives the benefit that offsets the loss of competition. In the case of the efficiency defence, the benefits are received by consumers who are rewarded with lower costs and greater quality and choice. The benefits created by the public interest defence, on the other hand, are acquired by members of the public in the form of wider social benefits such as cleaner air, better news coverage and access to conveniently

³⁹ As shall become evident under Section 3.5, below, the EU rules on merger control appear to preclude any possibility of Member States using the Article 21(4) ‘legitimate public interest’ clause in a positively way, in order to gain the competence to assess an anticompetitive merger on public interest grounds.

⁴⁰ Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 78.

⁴¹ The main requirements of this criterion include: that ‘consumers will be no worse off as a result of the merger’, ‘these efficiencies should be substantial and timely’ and lead to efficiency gains such as lower prices and new or improved products or services. *ibid* paras 79-81.

located health services. The second difference relates to *how* each of the defences is able to offset the adverse effect on competition. The efficiency defence, by its very nature, offsets the loss of competition by establishing efficiencies which, in turn, act to enhance consumer welfare. The public interest defence, in contrast, offsets the harm to competition by protecting or promoting wider social interests which do not necessarily relate to enhancing consumer welfare. It is therefore evident that the public interest defence cannot be facilitated under EU merger control in the same way as the efficiency defence, purely based on the fact that the benefits brought about by efficiencies are more readily measured in terms of consumer welfare. In practice, measuring the benefits brought about by the public interest marks one of the main concerns of using public interest criteria in merger control.

Indeed, as has been noted in Chapter 2, there are a number of concerns associated with the consideration of public interest goals under merger control assessments. They provide some explanation for why the Commission and Member States have been cautious in affording a role to the public interest. Considering these concerns not only allows us to draw conclusions on the influence of public interest goals in the present day, but also offers insights into their likely application in the future.

3.3. CHALLENGES POSED BY THE SUPRANATIONAL ARRANGEMENT OF THE EU

3.3.1. Institutional Concerns

A number of institutional concerns exist with regards to the supranational nature of the EU and the consideration of public interest goals in merger regulation. As has been referred to in Chapter 2, there are genuine legitimacy concerns raised where unelected bodies are required to make rulings on the public interest. How might this concern relate to the Commission's merger assessments? The decision making functions of the Commission – with regard to mergers referred to a Phase 2 investigation – are assigned

to the College of Commissioners, a cabinet of twenty-eight Commissioners from each Member State.⁴² Each of these Commissioners is appointed by the national governments of their respective Member States; although, their role is to represent the interests of the EU as a whole, rather than the interests of their country of origin. It is reasonable to assume that each individual Commissioner undertakes their duties without bias and, even if this were not the case, democracy within the College is protected by its majority voting policy. But, in seeking to represent the best interests of the EU as a whole, is the Commission best placed to recognise the importance of individual public interests?

If the public interest factor in question was expressly written into EU policy – such as environmental protection – it is conceivable that the Commission would be able to rule on the benefits it would bring to the wider EU. If, however, the Commission were made to rule on a public interest that was confined to a single Member State, it is unclear how adept the Commission would be. In the merger context, this would not only require the Commission to balance economic efficiency goals against public interest goals but, also, the public interest of one Member State against the interests of other Member States. As shall be shown in Section 3.5, Article 21(4) EUMR offers a possible means by which to overcome this institutional problem; although this provision has itself been plagued by controversy.

3.3.2. Issues of transparency and legal uncertainty

It is also worth emphasising the role of the College of Commissioners with regards to promoting certainty and transparency within the EU merger regime. Merging firms are able to derive a great deal of certainty if their transaction is to be subjected to an assessment process that demonstrates a high degree of procedural transparency. Indeed, there are a number of ways in which procedural transparency can provide

⁴² Whereas DG COMP are charged with conducting assessments of the competition-related factors of a merger, the actual decision-making authority lies with the College which shall consider DG COMP's findings.

greater certainty to merging firms who wish to predict the outcome of their transaction. If the decision-maker were to, for example, publish minutes from the meeting that decides the outcome of a merger, the merging parties could verify that the correct criteria had been applied. This exceeds the level of transparency that is offered by a decision document, which may exclude certain details such as dissenting views and, potentially, the consideration of public interest criteria. Moreover, procedural transparency also shines a spotlight on the conduct of decision-makers, who may therefore take greater efforts to adhere to the standard procedure. Under the EU regime, procedural transparency would appear to be facilitated by the openness of DG COMP during its investigation process. DG COMP affords comprehensive coverage to its merger investigations, by notifying the public of the commencement of an investigation and proceeding to track the case with regular bulletins up until its final report is delivered. Yet, as has been noted, it is the College of Commissioners – and not DG COMP – that are responsible for making the final decision on whether or not to permit a merger referred to Phase 2.

When deciding on the outcome of a transaction, the College will deliberate in a private meeting, where the discussions remain confidential between the Commissioners. For each meeting, the College is required to publish an agenda and a set of minutes; although, these documents are intended as summaries and rarely detail the reasoning behind the decision that is arrived at. This has apparent repercussions for transparency, especially given that secrecy at the decision making phase will – to an extent, at least – undermine the transparency demonstrated by DG COMP at the investigation stage. Political scientists have also noted that, in spite of the Commission's convergence towards a strict effects-based approach to merger control, the potential for public interest considerations to influence the decision making process will 'continue to provoke the merger purists as long as decisions are taken by the College of Commissioners, rather than by the staff of [DG COMP]'.⁴³ The lingering doubts

⁴³ Lee McGowan and Michelle Cini, 'Discretion and Politicization in EU Competition Policy: The Case of Merger Control' (1999) 12(2) *Governance: An International Journal of Policy and Administration* 175, 193.

caused by the lack of transparency at this final stage of the assessment process has evoked calls for a separate agency, a European Cartel Office (ECO), to be created which would openly make decisions based solely on competition grounds.⁴⁴ The establishment of such an agency does not, however, show signs of materialising in the immediate future. Thus, if the EU regime chooses to afford scope to public interest criteria, and yet lacks procedural transparency, legal certainty may continue to pose a problem to merging firms.

3.3.3. Do these challenges justify the exclusion of public interest considerations?

The concerns outlined above have been cited by the Commission as some of the main justifications for disregarding public interest considerations and, furthermore, for promoting a strict economics-based approach.⁴⁵ As such, a strict competition-based approach has become the orthodox position in mergers brought before the Commission.

Given the Commission's preference for a strict competition-based substantive test for assessment, it would appear that it is ignoring the applicability of public interest concerns in their entirety. The Commission's decision to overlook public interest considerations in this way is not necessarily an illegitimate one. If the effective accommodation of public interest considerations into EU merger control is impractical to the extent that it risks undermining the merger regime as a whole, then the Commission may have just grounds to disregard such considerations in pursuit of what is realistically attainable. But there are legal principles to adhere to here. If the purpose of a law is to achieve a number of objectives, but it is *practically impossible* to achieve all of those objectives without compromise, then it is justifiable that the law (and the law enforcer) seeks to prioritise the most important of those objectives. In contrast, where the purpose of a law is to achieve a number of objectives, but it is merely

⁴⁴ *ibid* 193. See also, Jones and Sufrin (n 33) 965, fn 589.

⁴⁵ See eg Almunia (n 4), and corresponding text in fn 42, below.

difficult to achieve all of those objectives, disregarding an objective is less readily justifiable. If this is the case, the Commission's approach could be seen to sit at odds with the Treaty. It may not be 'easy' for the Commission to remedy any of the aforementioned concerns, but it is certainly not impossible either. The progress of society is very much dependant on the ability of law makers to overcome procedural and practical difficulties in the pursuit of substantive objectives. Progress is stunted when law makers place too much emphasis on the ease at which a piece of legislation can be implemented and enforced. If the Commission has the legislative scope to consider wider public interest goals but, nonetheless, has adopted an economic approach on the basis that it is easier to implement, then it has – in effect – placed procedural norms before substantive norms. If this is the case, the Commission could be perceived as having sacrificed the relevance of an entire set of objectives in favour of an easier day-to-day assessment process, which would raise significant constitutional issues.

Having said this, the EUMR lacks any explicit reference to public interest criteria within its substantive assessment provisions, a characteristic that can be largely attributed to the demands of Member States during negotiations towards the EUMR, as Section 3.4 will allude to. Yet, as shall be explored in the next section, there still exist several possible avenues for public interest concerns to be considered under the EUMR, which appear to afford the Commission the necessary scope to consider the effect that a merger will have on wider social factors. The Commission's preference for a strict competition-based approach would, however, imply that it is unwilling to exploit these avenues. The premise therefore remains that the Commission is choosing to prioritise procedural norms over the attainment of substantive goals.

3.4. THE COMMISSION'S USE OF PUBLIC INTEREST CONSIDERATIONS IN MERGER ANALYSIS

Many of the concerns outlined in the previous section can be observed within the EU merger regime. Indeed, the Commission is wary of the possible challenges faced when affording a role to public interest considerations in the merger assessment procedure. In fact, this section refers to a number of instances where the Commission has emphasised these challenges in order to justify the exclusion of public interest considerations.⁴⁶ The Commission's response to these concerns has been to base its assessment on robust economic criteria, to which it has shown a strict adherence to. Is there therefore any scope that remains for the Commission to consider public interest criteria in the assessment phase? This, in itself, is open to debate but – particularly in light of the recent economic crisis – the public interest would appear to be back on the Commission's agenda.

3.4.1. The EU convergence towards a competition effects-based approach to merger control

As has been mentioned, at the heart of the Commission's competition-based approach to merger control lies the SIEC test, which replaced the dominance-based test previously adopted by the Commission under the 1989 Merger Regulation. The 'creation or strengthening of a dominant position' is now only an ancillary component of the substantive test for assessment under Article 2, meaning it is only one such effect that is capable of infringing the SIEC test.⁴⁷ As such, the SIEC test allows for a broader economic effects-based approach than the dominance-based test.

⁴⁶ The Commission now seems to prefer this justification for an economic approach, instead of justifying it in terms of the benefits brought by competition.

⁴⁷ Claes Bengtsson, Josep M Carpi and Anthony Whelan, 'Part 4 – The substantive assessment of mergers' in Götz Drauz and Christopher Jones (eds), *EU Competition Law: Mergers and Acquisitions* (Volume II, 2 edn, Claeys & Casteels 2012) 284.

Despite the competition effects-based approach that was adopted under the ECMR of 1989, a clause was inserted that would enable Member States to intervene in the Commission's assessment in order to protect legitimate public interests.⁴⁸ This 'national legitimate interest' clause remains in force under Article 21(4) of the current EUMR. The scope of its application is considered in detail under section 3.5 of this chapter. Generally, however, the EUMR acts to facilitate a 'one-stop-shop' principle, whereby all mergers with a Union dimension will be subject to assessment by the Commission alone. This means large-scale EU mergers are automatically subject to the Commission's review, meaning the Commission is afforded a strong platform on which to apply its economic agenda.⁴⁹

In relation to convergence as a whole, the response to the consolidation of the merger control rules into the Merger Regulations of 1989 and 2004 has been generally favourable. The benefit that this consolidation has brought to industry is notable, as the EUMR establishes a great deal of certainty and predictability for firms wishing to merge. The 'one-stop-shop' principle, in particular, is able to provide certainty to merging firms by ensuring that their transaction is only subject to the requirements of a single system of law. The extent to which public interest goals can influence EU merger assessment is, therefore, largely dependent on how strictly the Commission chooses to adhere to its economic approach. We might, therefore, ask whether there remains a scope for the Commission to depart from this approach and whether it is ever likely to do so.

⁴⁸ This was known as 'the British clause' and was framed under Article 21(3) of the original Regulation.

⁴⁹ Interestingly, Gerber also observes that – in centralising EU merger control in this way – the Court of Justice of the European Union (CJEU) only plays a marginal role in merger control, allowing the Commission's political concerns to dominate the decision making process. David J Gerber, 'The Transformation of European Community Competition Law?' (1994) 35 *Harvard International Law Journal* 97, 137.

3.4.2. Potential scope for public interest considerations by the Commission

On the face of it, the Commission’s substantive appraisal criteria, detailed under Article 2 EUMR, would not appear to provide any direct scope for the consideration of public interest concerns.⁵⁰ The provision does, however, afford mention to some efficiency criteria under Article 2(1).⁵¹ Under Article 2(1)(b), for example, the Commission is required to take into account ‘the development of technical and economic progress provided that it is to the consumers’ advantage and does not form an obstacle to competition’. The concept of ‘technical and economic progress’ can be classified as a non-competition interest of sorts but, as it acts to have a clear and measurable impact upon consumer welfare, it bears greater resemblance to the efficiencies category.⁵² Yet, regardless of its characteristics, it should be emphasised that ‘this is just one factor to be taken into account in the overall appraisal’ and, as such, its relevance is dependent on the individual circumstances of the case in question.⁵³ Furthermore, the likely influence of this criterion is limited by the interpretation that the Commission chooses to afford to efficiencies.

As we have discovered under Section 3.2.3, above, the Commission has chosen to limit the application of the efficiency defence in merger control by applying three separate criteria; namely, that they benefit consumers, they arise specifically as a result of the merger, and they are verifiable and likely to be realised. It is understandable that the Commission would wish to limit the application of the efficiency defence to an extent; after all, there would be little value in overseeing a merger assessment which excused anticompetitive mergers on the basis that they provide very minor efficiency benefits.

⁵⁰ Jones and Sufrin suggest that any attempt to infer the relevance of non-competition interests under Article 2 would require a teleological interpretation. Jones and Sufrin (n 33) 965.

⁵¹ The Commission shall take these criteria into account in each of its assessment procedures, *EU Horizontal Merger Guidelines* (n 40) para 76.

⁵² Townley does, however, suggest that this criterion implies some kind of industrial policy concern, Townley (n 34) 22.

⁵³ Jones and Sufrin (n 33) 964.

That said, it is interesting to ask whether the Commission needs to adopt such a narrow approach to efficiencies in its merger assessments. Consider, for instance, the very narrow interpretation that the Commission affords to efficiencies under Article 101(3) TFEU. This provision establishes the possibility of an efficiency defence to collusive agreements but, also, sets out four criteria for determining the legitimacy of individual efficiency arguments. In short, Article 101(3) permits the existence of any collusive agreement that: (1) provides efficiency gains, including the promotion of technical or economic progress,⁵⁴ (2) allows consumers a fair share of the resulting benefit,⁵⁵ (3) does not impose restrictions that are unnecessary in order to achieve these benefits, and (4) does not give undertakings the ability to eliminate competition within that relevant market. The reason why the Commission has chosen to afford such a narrow interpretation to efficiencies under Article 101(3) relates to its need to retain control over the enforcement of collusive agreements. If the Commission were to interpret efficiencies too broadly, a greater number of collusive agreements would have to be pardoned on efficiency grounds. Thus, the Commission would – to a certain degree – be sacrificing its ability to control cartels and to prohibit collusive arrangements. So, based on this, the Commission’s decision to maintain a narrow approach to efficiencies under Article 101(3) would seem logical, but is this also the case of the Commission’s approach to efficiencies in merger control?

The dynamics involved in administering merger control are, of course, very different to those seen in the application of Article 101(3). One of the key differences with regards to merger control is that, by virtue of the ‘one-stop-shop’ principle, the Commission retains an exclusive competence to assess all mergers that amount to possessing a Union dimension. This is the case regardless of how they are to interpret the application of the efficiency defence. In other words, the Commission could apply a broad interpretation to efficiencies under the EUMR without compromising its

⁵⁴ This usually requires a direct causal link to exist between the agreement and the claimed efficiencies; Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, para 54.

⁵⁵ A ‘fair share’ should at least compensate consumers for any likely adverse impact caused to welfare by the loss of competition; *ibid* para 85.

competence to assess all transactions that meet the turnover thresholds required for Community dimension. As such, there is perhaps an argument for suggesting that the Commission should be seeking to rely on efficiencies more regularly, in order to ensure that consumer welfare is optimised with the benefits of efficiency as well as competition. To extend this argument further, the Commission could also apply public interest criteria to its assessment procedure without compromising its competence over mergers. Perhaps, then, the Commission should exercise a greater degree of creativity to this end.

On numerous occasions during his tenure as Commissioner for Competition, Joaquín Almunia reiterated his belief that competition alone should dictate the assessment of mergers at EU level. He remained defiant in the belief that ‘EU merger control must remain anchored in its own rules and purpose’ and he insists that ‘[i]t is crucial to keep our merger review immune from non-competition considerations’.⁵⁶ This rather conclusively conveyed the Commission’s intention to ignore any public interest arguments put forward during the assessment process. And, yet, the very fact that Almunia would feel the need to stress this belief implies that the Commission is – in theory at least – able to afford scope to public interest goals.

Indeed, academic commentators have noted the potential scope afforded to public interest goals by Recital 23 of the EUMR.⁵⁷ This reads as follows:

It is necessary to establish whether or not concentrations with a Community dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. *In doing so, the Commission must place its appraisal within the general framework of*

⁵⁶ Almunia (n 4). Incidentally, he justifies these statements by suggesting that the existence of Article 21(4) provides sufficient scope for non-competition issues to be raised by Member States. The legitimacy of this statement is explored in Section 3.5 of this chapter.

⁵⁷ Formerly, Recital 13 of the 1989 EUMR.

*the achievement of the fundamental objectives referred to in [Article 3 of the Treaty on European Union].*⁵⁸

The ‘fundamental objectives’, as featured under Article 3 of the Treaty on European Union (TEU),⁵⁹ are broadly drafted to include such aims as: the promotion of peace, the well-being and security of citizens, full employment and social progress, protection and improvement of the environment, and various other aims. On the literal interpretation of Recital 23, one may ask whether the Commission’s substantive appraisal might therefore be influenced by the wider social goals outlined under Article 3 TEU. This would, of course, afford express influence to public interest goals under the EUMR itself. Taken at face value, the duty which Recital 23 imposes on the Commission to ‘place its appraisal within the general framework’ of the fundamental objectives should, most probably, have a limited application. In other words, rather than requiring the Commission to expressly consider each and every fundamental objective when assessing a merger, Recital 23 requires that the Commission comes to a decision that is largely compatible with the fundamental aims of the EU. Under this interpretation, the Commission is under a negative duty not to infringe the fundamental objectives of the EU. It is not under a positive duty to consider these fundamental aims as part of its substantive assessment.

Other commentators have, however, interpreted Recital 23 as conferring a slightly different duty on the Commission. Portwood, for example, appears to suggest that it confers both a negative and positive duty on the Commission in relation to the fundamental objectives of the EU.⁶⁰ On the one hand, he infers the existence of a negative duty not to infringe the fundamental objectives by suggesting that, where competition is in conflict with a fundamental objective, the fundamental objective must always take precedence. Equally, he seems to infer a positive duty on the

⁵⁸ [*Emphasis added*]. The precise wording of Recital 23 refers to the fundamental objectives contained under Article 2 TEC and Article 2 of the previous TEU. These provisions are now replaced, in substance, by Article 3 TEU.

⁵⁹ [2010] OJ C83/13.

⁶⁰ Timothy Portwood, *Mergers under EEC Competition Law* (The Athlone Press 1994) 92.

Commission by suggesting that, even where there is no conflict, ‘the achievement of the fundamental objectives must always inform the application of the competition rules’.⁶¹ Portwood proceeds to outline a number of public interest concerns that might be used by the merging parties as ‘defences’ for otherwise anticompetitive mergers.⁶² These interpretations – though interesting in theory – are perhaps somewhat far-fetched in the present context. In particular, the possibility of public interest factors being used to justify anticompetitive mergers does not sit well with the Commission’s current policy. The ‘negative duty’ interpretation of Recital 23 is perhaps most credit-worthy given that it would only apply in very rare circumstances, where a merger would be likely to have a genuinely detrimental effect on the fundamental aims of the EU. This would correspond with Banks’ 1996 interview with a member of DG COMP, who implied that ‘issues concerning [Recital 23] have not really arisen in practice’.⁶³

On this basis, Recital 23 cannot be said to afford any significant degree of influence to public interest goals in substantive merger assessments. That said, there exists a couple of notable cases in the aviation sector where the Commission’s approach to merger assessment appears to encompass a consideration of the wider goals of the EU. In the *Air France/KLM* joint venture,⁶⁴ the Commission chose to clear the transaction – subject to remedies – despite the merger creating a sixty per cent share in routes at two prominent European airports and, moreover, creating the largest airline in Europe.⁶⁵ This is one occasion where, in addition to considering the effect that the merger was likely to have on competition, DG Competition had sought to align its policy approach with that of DG Transport,⁶⁶ thereby taking account of the likely benefits that would ensue from the consolidation of European carriers. In the

⁶¹ *ibid.*

⁶² *ibid.* 93.

⁶³ David Banks, ‘Non-competition factors and their future relevance under European merger law’ (1997) 18(3) ECLR 182, 184. The interview itself was with a member of the Commission’s now defunct Merger Task Force.

⁶⁴ *Air France/KLM* (Case COMP/M.3280) [2004] OJ C60/5.

⁶⁵ Dawna L. Rhoades, *Evolution of International Aviation* (3rd edn, Ashgate 2014) 156.

⁶⁶ Peter Alexiadis and Daniel Kanter, ‘The European Commission Consents to the Consolidation of Europe’s Skies: The Air France/KLM Merger’ (2005) 14(1) Utilities Law Review 1.

Boeing/McDonnell Douglas case,⁶⁷ involving the mega-merger of two American multinational aerospace companies, the transaction was met with strong opposition from the Commission on both competition grounds and, allegedly, on the grounds that the merger would be contrary to the Article 3 EC objective of strengthening ‘economic and social cohesion’ within the EU.⁶⁸ Although the merger was ultimately afforded clearance in the EU, it has been suggested that the Commission’s initial opposition was a direct attempt to strengthen or preserve the European civil aviation industry, namely by considering the competitive effects that the merger would exert on Airbus.⁶⁹ Both of these cases appear to add credibility to Portwood’s view that the Commission has a ‘negative duty’ under Recital 23 to avoid acting contrary to the goals of the EU when undertaking its merger assessments. However, as both cases involved competition concerns, they do little to shed light on whether Portwood’s interpretation of an additional ‘positive duty’ – for the Commission to consider the fundamental objectives of the EU even in mergers that do not raise competition concerns – is a legitimate one.

Yet it is premature to conclude that the *Air France/KLM* and *Boeing/McDonnell Douglas* cases provide definitive evidence of an enduring role for wider public interest considerations in EU merger assessments. Just as Commissioner Almunia frequently reiterated his belief in an EU merger regime driven by competition, the early signs are that his successor, Margrethe Vestager, is prepared to continue this approach. In a ‘mission letter’ sent to Vestager by the President of the EU, Jean-Claude Juncker, he requested that DG Competition ‘keep developing an economic as well as a legal approach to the assessment of competition issues’ and to continue taking steps towards ‘promoting a competition culture in the EU’.⁷⁰ Indeed, from her early public

⁶⁷ *Boeing/McDonnell Douglas* (Case No IV/M.877) Commission Decision 97/816/EC [1997] OJ L336/16.

⁶⁸ Amy Ann Karpel, ‘The European Commission’s decision on the Boeing-McDonnell Douglas merger and the need for greater US-EU cooperation in the merger field’ (1998) 47(4) *American University Law Review* 1029, 1060.

⁶⁹ *ibid.*

⁷⁰ Letter from Jean-Claude Juncker to Margrethe Vestager (1 November 2014) 4 <http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/vestager_en.pdf> accessed 31 May 2016.

addresses, Vestager appears unyielding in her pursuit of a competition-based approach to competition enforcement, stating that – for the sake of legal certainty – the Commission would not cave in to pressure to consider non-competition interests from Member States and other governments.⁷¹

However, a change of approach may be afoot under the Vestager administration in the context of telecoms consolidation in the EU. During the course of their time as Commissioner for Competition, both Almunia and Vestager routinely refused requests from Member States to reassign competence to national competition authorities under Article 9 EUMR,⁷² citing the importance of telecoms mergers being dealt with at EU level. During Almunia's term, it was not uncommon for the Commission to permit 'four to three' mergers in the telecoms sector,⁷³ owing to the fact that such mergers were conducive towards achieving the EU's objective of creating a pan-EU telecoms market.⁷⁴ This is one stark illustration of Almunia's willingness to allow wider EU public interest goals to influence the Commission's assessment process, even where competition concerns arise. In contrast, Vestager now appears to be taking an altogether more competition-based approach, or so the Commission's approach at the start of her term would indicate. For example, Vestager expressed scepticism towards the *TeliaSonera/Telenor* transaction in 2015, a joint venture between the Danish operations of two Scandinavian telecoms companies,⁷⁵ which the parties abandoned after the Commission requested substantial remedies to address significant

⁷¹ Margrethe Vestager, 'Independence is non-negotiable' (Chatham House conference on 'Politicization of Competition Policy: Myth or Reality?', London, 18 June 2015) <http://ec.europa.eu/commission/2014-2019/vestager/announcements/independence-non-negotiable_en> accessed 31 May 2016. Vestager proceeded to indicate that the Commission's independence was 'simply non-negotiable' as its legitimacy and credibility depended on it.

⁷² Among other things, Article 9 allows national competition authorities to apply for jurisdiction to rule on mergers that are likely to have a particularly significant impact on competition in their domestic markets.

⁷³ Craig Pouncey, Kyriakos Fountoukakos and Julia Tew, 'EU merger control in 2014/5: business as usual?' in Global Competition Review, *The European Antitrust Review 2016* (GCR 2015) 32.

⁷⁴ For an outline of the Commission's pan-EU telecoms market objective, see European Commission, 'Commission adopts regulatory proposals for a Connected Continent' (European Commission Press Release, 11 September 2013) <http://europa.eu/rapid/press-release_MEMO-13-779_en.htm> accessed 31 May 2016.

⁷⁵ *TeliaSonera/Telenor/JV* (Case M.7419) [2015] OJ C119/1.

competition concerns.⁷⁶ Shortly after the parties announced their decision to withdraw from the merger, Vestager distanced herself from any requirement to consider the benefits that the merger could create for a pan-EU telecoms market, instead reiterating the Commission's task of 'ensuring that markets are competitive'.⁷⁷ This policy stance has prompted many to conclude that Vestager will continue to prioritise competition over more consolidation towards an integrated EU telecoms market.⁷⁸ A similar rhetoric can be observed in the *Hutchinson/Telefonica* case,⁷⁹ where the Commission refused an Article 9 request from the UK Competition and Markets Authority (CMA), citing that its experience of dealing with mergers in the telecoms industry meant it was 'better placed' to deal with the transaction.⁸⁰ Interestingly, the case also saw the incumbent Chief Executive of the CMA, Alex Chisholm, make a written plea to Vestager, asking the Commission to block the merger on competition grounds,⁸¹ a decision that the Commission ultimately drew. If one were to analogise these cases in the telecoms sector with the approach that the adopts in other markets, the inference is that the Commission under Vestager is moving even further towards a strict competition approach, and away from an approach that considers wider Treaty objectives by virtue of the Recital 23 policy-linking clause.

Given the strict economic nature of the SIEC test, the seemingly symbolic status of Recital 23, and the hard-line competition approach adopted by successive Competition Commissioners, one can infer that the approach adopted in EU merger control – in

⁷⁶ Margrethe Vestager, 'Competition in telecom markets' (42nd Annual Conference on International Antitrust Law and Policy, New York, 2 October 2015) <http://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-telecom-markets_en> accessed 31 May 2016.

⁷⁷ DG Competition, 'Statement by Commissioner Vestager on announcement by Telenor and TeliaSonera to withdraw from proposed merger' (European Commission Press Release, 11 September 2015) <http://europa.eu/rapid/press-release_STATEMENT-15-5627_en.htm> accessed 31 May 2016.

⁷⁸ Daniel Thomas, 'EU favours competition over deals in telecoms sector' (*Financial Times*, 22 October 2015) <www.ft.com/cms/s/0/ed4fc186-773a-11e5-933d-efcdc3c11c89.html#axzz4AWL20A2U> accessed 31 May 2016.

⁷⁹ *Hutchinson 3G UK/Telefonica UK* (Case M.7612) [2016].

⁸⁰ DG Competition, 'Mergers: Commission continues investigation of Hutchinson 3G / Telefónica UK merger without referral to UK' (European Commission Press Release, 4 December 2015) <http://europa.eu/rapid/press-release_IP-15-6251_en.htm> accessed 31 May 2016.

⁸¹ Letter from Alex Chisholm to Margrethe Vestager (11 April 2016) <www.gov.uk/government/publications/proposed-hutchison-telefonica-merger-cma-letter-to-european-commission> accessed 31 May 2016.

practice at least – falls very much within the ‘strict competition-based approach’ area of *Figure 1* in the previous chapter. Moreover, policy statements by Vestager in *TeliaSonera/Telenor* and *Hutchinson/Telefonica* suggest that the EU approach now lies close to the ‘pure competition-based’ extreme of the spectrum. In the light of this, can we say that there is any tangible possibility that the Commission will afford consideration to public interest goals in any of its merger assessments? On this point, it is important to bear in mind the political dynamics at play. It has been the Commission’s decision to adopt a strict effects-based approach to merger control and, equally, the Commission has chosen to incorporate this policy within the EUMR. Can the Commission not, therefore, adapt its policy where it is necessary in the wider interests of the EU? The 2007-08 global economic crisis provides the basis on which to address this very question.

3.4.3. Insights offered by EU merger control in times of economic crisis

In the midst of the global financial crisis, the EU has had to contend with an array of unforeseen hardships, both at Member State level and the EU as a whole. In these uncertain times, concerns have been raised over the ability of competition to create and sustain economic prosperity,⁸² or at least its ability to guide the EU away from economic turmoil.⁸³ One widely proposed solution was to adopt a less stringent approach to competition policy, to aid the recovery of domestic economies in the short-term. This was observed in the context of merger control, with the UK government’s creation of a public interest exception to protect the financial stability of the UK banking industry.⁸⁴ Merger activity is liable to decline in times of austerity but, nevertheless, merger control was considered an effective – and perhaps desirable

⁸² See, for example, Jesse W Markham Jr, ‘Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the ‘Too-Big-To-Fail’ Phenomenon’ (2010) University of San Francisco Law Research Paper No.2011-15.

⁸³ Neven suggests that ‘[a]dopting a lax approach towards competition policy is at best an indirect and at worst a counterproductive response’ to market failures; Damien Neven, Robin Nuttall and Paul Seabright, *Merger in Daylight: The Economics and Politics of European Merger Control* (Centre for Economic Policy Research 1993) 12.

⁸⁴ This facilitated the merger between Lloyds TSB and the troubled HBOS, which was exempted from review before the Competition Commission.

– alternative to state aid when the crisis was at its peak. It was therefore interesting to see whether the Commission might itself adopt a flexible approach to its own merger policy in order to aid the recovery process.

In reality, the Commission's adherence to competition has shown little sign of wavering, particularly in relation to merger control. The recovery process has largely been a decentralised affair and the Commission's main role has been to rule on state aid cases. Former Commissioner Almunia spoke of how the Commission had resisted calls to adopt a more lenient approach to competition policy, citing his belief that 'maintaining competitive market structures is just as important in lean years as it is in fat years'.⁸⁵ Similarly, in the face of calls for the Commission to adopt protectionist measures in an effort to soften the blow of the crisis in the eurozone, Almunia remained adamant that such industrial policy measures would cause more harm than good in the long-term.⁸⁶ He fears that protecting firms in this manner would create trade barriers which, given the status of the EU as the largest foreign investor in the world, could prove catastrophic.⁸⁷ The actual validity of these statements is not of importance here. What is important is that Almunia's views reflect the wider views of the Commission in times of austerity. The Commission's continued adherence to a strict competition-based approach throughout the crisis is evidence of this. As such, it would appear that, even in times when they may offer short-term benefits to the wider EU, public interest goals are not afforded consideration in the Commission's merger assessment procedure.

There is, however, a hypothetical scenario that might be considered in relation to the global financial crisis. The provisions for the Commission's appraisal of mergers, in accordance with Article 2 EUMR, specify that the Commission should take into account the potential effect of a merger on 'competition from undertakings located

⁸⁵ Almunia (n 4).

⁸⁶ Joaquín Almunia, 'The role of competition policy in times of crisis' (29th Annual AmCham EU Competition Policy Conference, Brussels, December 2012) <http://europa.eu/rapid/press-release_SPEECH-12-917_en.htm> accessed 25 September 2015.

⁸⁷ Almunia (n 21).

within or without the Community'.⁸⁸ According to Portwood, this allows the Commission to consider the global competitiveness of merging two EU undertakings which, although anticompetitive, would be 'likely to provide resistance' to the threat of foreign takeovers.⁸⁹ It is interesting, given the on-going economic concerns within the eurozone, whether the Commission might itself be forced to adopt defensive protectionist tactics to discourage an influx in foreign investment. Current Commission policy would suggest not but, if the eurozone were to remain in an extended period of austerity, the political pressure from Member States may evoke a change in policy. An alternative to protectionist measures might be to establish comity arrangements between the EU and its large trading partners. This would enable the wider industrial policy of the EU to be given effect to in other jurisdictions while, in turn, the Commission may be required to consider the non-competition concerns of non-EU states in its own merger assessment. This is, of course, very much a last resort as far as the Commission is concerned and the compatibility issues between merger control and comity means it is unlikely that the Commission is ever likely to utilise it in this way.⁹⁰

In light of the aforementioned, the potential for public interest goals to be considered by the Commission in its EU-level merger assessments would appear to exist in theory and hypotheticals, rather than in reality itself. We might therefore consider the role that is retained by Member States under the EUMR to intervene in EU-level mergers on public interest grounds.

⁸⁸ Article 2(1)(a) EUMR.

⁸⁹ Portwood (n 60) 94. Portwood, himself, suggests this would only ever be possible when the EU market was in a weak position.

⁹⁰ Particularly, positive comity is considered to be incompatible with the time limits involved in merger control proceedings. Bruno Zanettin, *Cooperation between Antitrust Agencies at the International Level* (Hart Publishing, Oxford 2002) 186-187.

3.5. MEMBER STATE INTERVENTION ON PUBLIC INTEREST GROUNDS

With the scope for the Commission to consider public interest goals seemingly non-existent in practice, Member State intervention is perhaps the most likely source of public interest influence in European merger control. But to what extent is this true? As has been referred to in the previous section, Article 21(4) of the EUMR affords a degree of power to Member States to assume jurisdiction over EU-level mergers that are likely to impact upon their legitimate national interests. This marginal decentralisation has, in theory, the potential to erode the strict competition-based assessment found at EU level, and affords Member States the scope in which to consider wider public interests in their own assessment. Indeed, although this discretionary jurisdictional clause does not affect the Commission's approach, it does enable public interest considerations to enter the EU merger arena 'via the back door', by allowing Member States to rule on mergers that otherwise amount to having a Union Dimension. The extent to which a Member State will give account to public interest considerations in its assessment will largely depend on its domestic merger laws. As such, it is wise to consider the influence that Member States afford to public interest considerations at domestic level, as this may offer insights on the degree to which Member States would be likely to make an application under Article 21(4).

3.5.1. Member State convergence towards a centralised economic approach

The state of domestic Member State merger control very much resembles a collection of states that have converged towards a common effects-based approach to merger assessment. Of the 28 Member States that adopt merger control law,⁹¹ every single one relies on a competition-based substantive test as part of its approach.⁹² But 19 Member States continue to afford at least some formal scope to the consideration of

⁹¹ Note that Luxembourg does not.

⁹² See Appendix 10. Specifically, 12 Member States adopt a dominance-based test, 10 adopt an SIEC test (or equivalent) and 4 apply the SLC test.

public interest concerns in merger assessments.⁹³ Given this, it is evident that most Member States are still willing to consider the public interest under certain circumstances. So there are likely to be instances where Member States will be eager to rule on mergers of particular national significance, instead of having them assessed by the Commission.

Traditionally, Member States have been reluctant to cede power to the Commission in relation to assessing mergers which impact upon their national economies. An upturn in merger activity at the end of the 1980s had, however, alerted Member State governments to the trend of cross-border mergers and the practical issues associated with them. Companies began to feel they could benefit from the legal certainty that could be derived from the ‘one-stop-shop’ principle subsisting under a single Regulation,⁹⁴ and Member States were recognising the perceived benefits to their own industries. With this in mind, the birth of the EUMR of 1989 was imminent, and yet certain Member States – the United Kingdom in particular – wished to insert a clause under the EUMR which would allow Member States to influence decisions of notable national significance.⁹⁵ This saw the insertion of – what is now – Article 21(4) into the EUMR.

3.5.2. Article 21(4) EUMR: The national legitimate interest exemption

The wording of Article 21(4) is as follows:

Notwithstanding paragraphs 2 and 3, *Member States may take appropriate measures to protect legitimate interests* other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

⁹³ *ibid.* ‘Formal scope’ refers to explicit reference to public interest criteria in merger legislation. The author recognises that there are other ways for states to give effect to public interest considerations (eg sector-specific policy), and these are explored empirically in Chapter 5.

⁹⁴ Bulmer (n 25) 432.

⁹⁵ In practice, it was likely that the mergers that met the EUMR’s turnover thresholds would be capable of having a notable economic and social effect in the relevant Member State.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication.⁹⁶

So, in deviating from the Commission's exclusive competence, Article 21(4) affords Member States the potential to invoke public interest concerns for 'jurisdictional purposes' by '[removing] certain aspects of the transaction from the Commission's exclusive jurisdiction'.⁹⁷ The wording of the provision is noticeably defensive: measures must be 'appropriate', interests should be 'legitimate' and each should be compatible with the general principles of EU law. Nevertheless, the clause provides a non-exhaustive list of legitimate interests that may warrant Member State intervention, including: public security, media plurality and prudential rules. These are otherwise known as the *per se* legitimate interests and need not be communicated to the Commission before the Member State proceeds to take appropriate measures to protect them.⁹⁸ Member States may refer additional public interests by virtue of paragraph 3 of the provision. Borges refers to these as the 'innominate' public interests, the legitimacy of which shall be determined by the Commission on a case-by-case basis.⁹⁹ This, of course, allows for the prospect of the Commission to deem a certain public interest argument to be legitimate in one case but not another; thereby

⁹⁶ [Emphasis added].

⁹⁷ Nicolas Petit, 'Non-competition concerns under the ECMR – An overview' (2008) 4 *Concurrences* 182 <<http://orbi.ulg.ac.be/bitstream/2268/22384/1/concurrences.pdf>> accessed 25 September 2015.

⁹⁸ The Commission shall, however, make preliminary enquiries to ensure that the interest in question falls within the ambit of one of these three named interests.

⁹⁹ Gonçalo Machado Borges, 'The Legitimate Interests of Member States in EC Merger Law' (2003) 9(3) *European Public Law* 345, 352.

in keeping with the fluid concept of the public interest that has been discussed in this chapter.

The power that Article 21(4) actually affords to Member States is often debated; although, this debate tends to centre around whether or not Member States always had a power to intervene by way of their territorial rights.¹⁰⁰ But, regardless of how long the Member States have possessed this power, the extent to which they are able to exercise their Article 21(4) right is unclear to this day. Some suggest that Article 21(4) provides the scope for ‘social, economic, technological, and regional criteria’ to enter into EU merger control via the back door.¹⁰¹ Others have suggested that it enables Member States to ‘protect buyers of shares and minority interests’.¹⁰² But perhaps it is wiser to first consider the limitations of Article 21(4), before assessing the scope of its application.

One potential limitation is the fact commonly held belief that Article 21(4) may only be applied negatively, as has been alluded to in the only existing guidance that references the provision.¹⁰³ In other words, a Member State may only assume jurisdiction under the provision in order to *block* pro-competitive mergers in the interests of the state. It may not assume jurisdiction in order to *permit* a merger that has already been ruled as anticompetitive by the Commission. Immediately, therefore, it becomes apparent that Article 21(4) cannot provide broad access to public interest concerns and, certainly, it does not enable public interests to take priority over competition concerns.

¹⁰⁰ For comment on the suggestion that Article 21(4) affords no new rights to Member States, see: Commission, ‘Community merger control law’ (EC Bulletin) Supplement 2/90, 25 <<http://aei.pitt.edu/8589/>> accessed 25 September 2015. Edurne Navarro and others, *Merger Control in the EU* (2nd edn OUP, Oxford 2005), 412. *ibid* 352.

¹⁰¹ Schwartz (n 35) 658.

¹⁰² Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules* (2nd edn Kluwer, Netherlands 2002) 322.

¹⁰³ EC Bulletin (n 100) 24. The supplementary notes suggest that Article 21(4) does not afford Member States ‘any power to authorise concentrations which the Commission may have prohibited under this regulation.’

A further limitation can be inferred from the wording of the first paragraph of Article 21(4); namely, that the legitimate interests protected by Member States should be interests ‘other than those taken into consideration’ by the EUMR. At first glance, this statement would merely appear to prevent Member States from raising ‘competition’ as a legitimate interest, given that competition represents the underlying consideration of the Regulation. But, as we have seen, the EUMR makes reference to the wider policy objectives of the Treaty which, by its express decree, should be taken into consideration by the Commission when reaching its decision. Do these wider Treaty objectives therefore constitute interests that are taken into consideration by the EUMR, even if they are not considered by the Commission in practice? If so, Member States would be unable to raise legitimate interest concerns relating to any of the objectives featured under Article 3 TEU – including employment – as these are considered by the EUMR by virtue of their reference under Recital 23.¹⁰⁴ It further implies that the Commission is the only institution that has the competence to determine whether a wider Treaty objective is applicable to any given merger assessment. As such, if the first paragraph of Article 21(4) were to be interpreted this way, the Commission may create a bottleneck situation as regards the consideration of public interest goals. An alternative interpretation would be to suggest that wider Treaty goals are not directly considered by the EUMR as they do not play a part in the Commission’s substantive assessment under Article 2. A lack of guidance or case law has meant that the interpretation of the first paragraph of Article 21(4) remains a matter of dispute. But, aside from the legal certainty concerns this raises for parties, the wording of this first paragraph should at least be considered a potential limitation to the influence of the public interest under Article 21(4).

A final prominent limitation imposed on the applicability of Article 21(4) is the requirement that the public interest notified by the Member State should be compatible

¹⁰⁴ Indeed, Lübking and Dittert suggest that measures adopted under Article 21(4) may not ‘overlap with other fundamental objectives of the Treaties that are taken into account by the Merger Regulation’. Johannes Lübking and Daniel Dittert, ‘Chapter 6 – Remaining competences of the Member States’ in Götz Drauz and Christopher Jones (eds), *EU Competition Law: Mergers and Acquisitions* (Volume II, 2 edn Claeys & Casteels, Deventer (Netherlands) 2012) 158.

with ‘the general principles and other provisions of Community law’, in accordance with paragraphs 1 and 3 of the provision. The ‘other provisions of Community law’ encompass the Treaty provisions, including those relating to the fundamental freedoms, such as the freedoms of establishment and movement of capital. The ‘general principles’ refer to the more procedural concepts of EU law, such as the principles of non-discrimination and proportionality. The principle of proportionality, in particular, is one that significantly limits the ability of Member States to argue public interest concerns under Article 21(4). Brief guidance on the intended functioning of Article 21(4) refers to the significance of proportionality, stating that measures taken by Member States ‘must be limited to the minimum of action necessary to ensure protection of the legitimate interest in question.’¹⁰⁵ This has been formally reiterated in the case of *Commission v France*,¹⁰⁶ where the European Court of Justice (ECJ) specified the need for domestic measures under Article 21(4) to be ‘proportionate to the aim being pursued’ and, as such, ‘necessary insofar as the objective could not be pursued by a measure less restrictive of the freedom affected’.¹⁰⁷ Certainly, the principle of proportionality is warranted on the basis that it guards against the ability of Member States to abuse the scope afforded to them under the provision. Yet the enforcement of this principle, coupled with the defensive wording of Article 21(4), raises concerns regarding just how much influence the provision is able to afford to national legitimate interests under EU merger control.

3.5.3. The specific concerns of Article 21(4)

In many ways, the limited application of Article 21(4) is unsurprising given the importance attributed to competition by the Commission. The economic impact of blocking a single merger that does not raise competition concerns may appear only marginal,¹⁰⁸ but this may establish an unhelpful precedence that could lead to a

¹⁰⁵ EC Bulletin (n 100) 25.

¹⁰⁶ Case C-483/99 *Commission v France* [2002] ECR I-4781, para 46.

¹⁰⁷ Michael Harker, ‘Cross-border mergers in the EU: the Commission v the Member States’ (2007) 3(2) *European Competition Journal* 503, 524.

¹⁰⁸ The only obvious opportunity costs are the loss of potential efficiencies arising from the transaction.

number of pro-competitive mergers. The impact of permitting an anticompetitive merger, on the other hand, can have an immediately disruptive impact on the EU economy, even when it seeks to serve the public interest. This latter positive application of Article 21(4) would appear to sit at odds with the Commission's competition policy and the fundamental goals of the EU. But, aside from this incompatibility, the application of Article 21(4) may also be limited by some of the concerns that have been noted under section 3 of this chapter.

Member State protectionism represents the main concern of the scope afforded by Article 21(4). Even when the EUMR was in its infancy, the provision was seen as a potential source on which to base protectionist acts. Guidance released in the wake of the 1989 EUMR provides that 'it is essential that prohibitions or restrictions placed on the forming of concentrations should constitute neither a form of arbitrary discrimination nor a disguised restriction in trade between Member States.'¹⁰⁹ It is the opinion of most commentators that the unfounded protectionist use of industrial policy measures is never capable of amounting to a legitimate interest.¹¹⁰ However, it is often difficult to distinguish between a legitimate and an illegitimate use of industrial policy, especially if a Member State has no apparent history of adopting illegitimate measures. Given the benefits which can accompany a legitimate application of industrial policy, it would be excessive if the Commission were to disregard all industrial policy arguments in an effort to combat protectionism. As such, it seems concerns remain over a protectionist culture emerging out of Article 21(4).

Some legal scholars, however, believe that the opposite is true and that – under the correct procedure – the Commission can actually use Article 21(4) to counteract protectionist behaviour. Gerard, for example, suggests that the Commission will always adopt the default position to allow cross-border mergers in accordance with

¹⁰⁹ EC Bulletin (n 100) 25.

¹¹⁰ See, for example, Lübking and Dittert (n 104) 161.

the Freedom of establishment.¹¹¹ In order to depart from this position, Member State measures will have to satisfy a three-part ‘internal market’ analysis that includes: (i) whether the measure amounts to an obstacle to trade, (ii) whether that obstacle can be justified by ‘overriding public interest grounds’, and (iii) whether that justification is proportionate and non-discriminatory.¹¹² Where the Commission conducts such a robust assessment of Member State measures, the risk of protectionism would appear to be largely alleviated. And yet, in doing so, the scope for other public interests to be considered by virtue of Article 21(4) is further narrowed. That said, it has been noted that industrial policy represents one of the more controversial areas of the public interest category and, as such, the Commission may view it with more scepticism than other public interests.

Article 21(4) may therefore be seen to provide reasonable safeguards against protectionism in theory. In reality, however, the outlook is different. Indeed, rather than alleviating the fears of misuse and protectionism under Article 21(4), it has been suggested that the case law actually highlights these concerns in practice.¹¹³

3.5.4. Article 21(4) in practice

At the time of writing, relatively few merger cases have been permitted to proceed on the basis of Article 21(4); with eight cases in total between 1989-2015, and none at all between 2008-2015.¹¹⁴ One may, however, draw several conclusions from this selection of decisions. The table in Appendix 11 lists these decisions in chronological order and provides some interpretations for the effect that each decision was likely to have on the scope of Article 21(4).

¹¹¹ Damien Gerard, ‘Protectionist threats against cross-border mergers: unexplored avenues to strengthen the effectiveness of Article 21 ECMR’ (2008) 45(4) *Common Market Law Review* 987, 996.

¹¹² *ibid* 1016.

¹¹³ Harker (n 107) 503.

¹¹⁴ Richard Whish and David Bailey, *Competition Law* (8th edn, OUP 2016) 946.

Earlier Article 21(4) cases lack the controversy that some of the later decisions created. Most centred on questions of what constituted a ‘national legitimate interest’ for the purposes of the provision and, by virtue of a couple of Article 21(4) applications by the United Kingdom, the Commission was able to scope the provision to a certain extent. As Galloway observes,¹¹⁵ before granting a request under Article 21(4), the Commission will review the proposed measures put forward by the Member States in order to establish whether they are ‘appropriate, proportional and non-discriminatory’, as well as being compatible with EU law.¹¹⁶ The Commission cites this as one of its key functions in the case of *Lyonnaise des eaux/Northumbrian Water* where, following privatisation of the UK water industry, the United Kingdom was seeking to maintain a sufficient number of independent water providers in the market in an attempt to maintain competitive pressures on suppliers. Here, the Commission deemed that regulation of the domestic water industry constituted a legitimate national interest for the purposes of Article 21(4). Contrast this with the case of *EdF/London Electricity*,¹¹⁷ where the Commission decided that it was not necessary to recognise a legitimate interest, given that the regulatory measures imposed by the United Kingdom were already ongoing in the electricity industry and were not specifically targeted at the merger in question. This is indicative of the need for the intervention by Member States to be merger-specific in order to satisfy Article 21(4).

One conclusion that may be drawn from the later cases in Appendix 11 is that protectionist measures appear to be rife within the Member State context. In addition to blocking mergers outright, Member State governments have resorted to such tactical measures as fast-tracking new policy measures and facilitating domestic mergers to counteract acquisitions by foreign firms. Furthermore, the cases also show that Article 21(4) can act as an effective stalling mechanism, as several of these

¹¹⁵ Jonathan Galloway, ‘EC merger control: does the re-emergence of protectionism signal the death of the ‘one stop shop’?’ (3rd Annual CCP Summer Conference, Norwich, June 2007) 3 <http://competitionpolicy.ac.uk/documents/8158338/8258622/galloway_paper.pdf/00477a84-b8fd-450e-91e2-752f8e6a0d41> accessed 31 May 2016.

¹¹⁶ *Lyonnaise des Eaux/Northumbrian Water* (Case IV/M.567) [1996] OJ C11/3, para 8.

¹¹⁷ *Electricité de France/London Electricity* (Case IV/M.1346) [1999].

mergers collapsed before the Commission had even had the opportunity to rule on the legitimacy of the Member State measure.

The other main conclusion is that, in response to the apparent abuse of Article 21(4) by Member States, the Commission has adopted a very narrow interpretation of what constitutes a legitimate interest for the purposes of the provision. This may very well have come as a result of the increased scepticism that the Commission has been forced to exercise in dealing with the protectionist culture. The Commission also takes exception to Member States that pursue national measures without first notifying the Commission in accordance with paragraph 3 of Article 21(4). Indeed, Gerard suggests that the Commission could make more effective use of Article 21(4) by invoking this notification obligation on a more consistent basis.¹¹⁸

Article 21(4) has been in something of an enforcement exile for a number of years now, having witnessed an influx of cases between December 2005 and December 2006. This corresponds to a lull in enforcement that was first evident from the five year wait for the *BBVA/ABN-Amro* case to follow *Secil/Holderbank/Cimpar*. In truth, the insights that can be taken from the Commission's enforcement of Article 21(4) in practice are limited by the number of previous cases and the amount of time that has elapsed since the last decision. We may hope to gain further insights from future cases; though, as mentioned at the beginning of this section, there is little indication that Article 21(4) will wake from its dormant state in the foreseeable future.

3.5.5. The current and future prospects of Member State intervention

Considering the intended purpose of Article 21(4) and its application in practice, how effective is the provision in affording influence to public interest goals under EU merger control? Based on its first two decades in existence, it would appear to afford very little influence indeed. The Commission's enforcement of the provision, as it

¹¹⁸ Gerard (n 111) 996.

currently stands, is analogous to using a shield to protect its strict competition agenda. And given that the Commission is expected to adhere to its strict competition-based approach for an indefinite period,¹¹⁹ it is unlikely that Article 21(4) will afford any notable scope to public interest concerns for the foreseeable future.

As such, the very need for Article 21(4) to exist has been questioned by academics. Using the principal-agent model, Harker offers ‘several possible (and well-rehearsed) justifications’ for eliminating the scope of Member State intervention on public interest grounds and allowing the Commission to rule on all mergers with a Community dimension.¹²⁰ Firstly, it offers greater legal certainty as the Commission applies quantitative, rather than qualitative, criteria during the assessment stage. Secondly, a strict effects-based approach by the Commission at EU level is more likely to achieve long-term policy goals, and avoids the short-term policy goals of Member States. Indeed, one thing that the Commission has always sought to avoid is a situation where Article 21(4) is used by Member States ‘to undermine the Commission’s assessment of a case carried out for the whole of the internal market.’¹²¹ Thirdly, the long-term welfare of Member States is more likely to be increased, as the potential for efficiency-enhancing mergers to be blocked by Member State intervention is reduced. Finally, the Commission might be seen to be in a better position to develop capacity and expertise, possessing the scale to undertake this more efficiently than Member States. Each of these justifications can be seen to relate to the concerns referred to under section 3 of this chapter.

The continued role of Article 21(4) has, however, been afforded credibility by Commissioner Almunia as recently as 2011. He suggests that Article 21(4) contributes towards an effective merger regime that is well-balanced in practice. He cites the *NewsCorp/BSkyB* case as illustrative of this effectiveness as there ‘was no reason for

¹¹⁹ Banks (n 63) 185. One can also draw the analogy with Almunia and Vestager’s reluctance to afford competence to national competition authorities under Article 9 EUMR for mergers in the telecoms industry; see Section 3.4.2, above.

¹²⁰ Harker (n 107) 507.

¹²¹ Lübking and Dittert (n 104) 158.

[the Commission] to intervene on competition grounds at EU level, and the review of other public interests was left to the UK authorities.’¹²² That said, given that this case involved questions regarding media plurality, the status of media plurality as a named interest under Article 21(4) did not require the UK to make a notification in any case. As such, the case sheds little light on how legitimate national interests are likely to be managed in the future.

3.6. CONCLUDING REMARKS

The extent to which public interest goals are able to influence merger investigations at EU-level would appear very limited. To one extent, the Commission has chosen to adopt a strict competition-based approach to merger control and affords no role to public interest considerations within its substantive assessment process. Its decision to adopt this approach has been largely guided by the objective of achieving a long-term pursuit of consumer welfare. Moreover, it enables the Commission to avoid the various concerns raised in relation to considering public interest goals, including uncertainty and protectionism. Article 21(4), on the other hand, may have been interpreted as a beacon for public interest goals under the EU merger regime. Its potential effectiveness is, however, diminished by a number of limitations relating to its negative application, its case law history and the procedural requirements associated with it.

On this basis, the current state of the EU merger control regime would not appear to reflect the type of regime that can be inferred from the wording of the EUMR. We instead see the two main avenues for the public interest to influence merger decisions obstructed by the Commission. The first avenue – relating to the Commission’s substantive assessment – is blocked by the Commission’s strict interpretation of Article 2 EUMR and, therein, its apparent oversight of Recital 23. The second avenue

¹²² Almunia (n 4).

– via Article 21(4) – is largely obstructed by the Commission’s reluctance to cede competence to Member States and, in turn, its narrow interpretation of the provision.

It will be interesting to observe whether another unforeseen period of global economic decline will evoke a change of policy in the coming years, with merger control offering a preferable alternative to state aid. Perhaps a renewed emphasis on environmental policy may even see the Commission prioritise public wellbeing over consumer welfare, as it has done in other areas of competition policy; such as in the *CECED* decision. For now, though, competition remains at the heart of EU merger assessments and very much the sharp focus of the Commission’s substantive approach.

CHAPTER 4

Reconsidering the Role of the Public Interest in UK merger control[†]

4.1. INTRODUCTION

The role of public interest exceptions under merger control in the United Kingdom has, for many years now, divided the opinion of legal and economic commentators. In general terms, UK merger control is widely praised for its robust competition-based assessment of mergers, undertaken by a specialist independent competition authority. This approach has established certainty and consistency between merger decisions which, in turn, has allowed the regime to become more predictable for merging firms. But a limitation on this certainty is created by the reserved power of the Secretary of State to intervene in the assessment process where a merger raises certain named public interest concerns. This allows a politician to assume control of the assessment process and decide on the outcome of a merger by considering both competition and public interest criteria. If the Secretary of State decides that the public interest should take precedence over competition, they may rule that an anticompetitive merger should be cleared or that a competition-neutral merger should be blocked on public interest grounds. Moreover, aside from the named public interests exceptions listed under the Enterprise Act 2002, the Secretary of State also retains a residual power to propose new public interest criteria that are not specified under the statute.

Beyond these statutory powers, legal certainty in the UK merger regime potentially may also suffer as a consequence of another perceived shortfall in its institutional

[†] For their valuable feedback, the author wishes to thank the participants of the 105th Annual Conference of the Society of Legal Scholars (Nottingham), the 2014 LSE Media and Communications PhD Symposium (London), the 7th Annual UEA Law Research Colloquium (Norwich), and the 2015 CCP PhD Workshop (Norwich). Additional feedback from the CCP and UEA Law School seminar series is gratefully acknowledged.

arrangement. The Competition and Markets Authority,¹ as a default position, is charged with making the final decision on whether or not to grant approval to a merger transaction on competition grounds. However, in the case of public interest mergers, the decision rests with a single individual, the Secretary of State, who must balance a number of interests which are not necessarily directly comparable. An effective balancing of both competition and public interest considerations would, by all accounts, require the decision-maker to have a grounded understanding of each and an appreciation of the dynamics that link the two. Whether a single politician is capable of appreciating the importance of such a diverse range of interests is, again, a matter that continues to divide opinion.

The question at the heart of this discussion is whether the UK's approach to public interest mergers is an effective one. In other words, are politicians best-placed to rule on public interest mergers and, moreover, is it procedurally legitimate that these politicians are also able to propose new public interest criteria? Answering this question involves examining a number of core themes, including the role of politics in this area of law and its impact on the rule of law. If a merger regime is not seen to adhere to the rule of law, the certainty and credibility upon which the regime operates will be undermined. Such is the importance of certainty and predictability to the parties to a merger, the UK must ensure its laws are sufficiently transparent to facilitate this. If there is ambiguity in the UK's assessment of public interest mergers, it may have the effect of undermining the credibility of its wider merger regime, which may lead merger activity to stagnate.

This chapter offers a critique of the current role of the public interest and its possible implications on the future of UK merger control. It does this by scrutinising two perceived 'weaknesses' of the current regime, before proceeding to explore the effects that these weaknesses are likely to have in practice, should the list of public interest exceptions be extended. Section 2 sets the scene for the discussion by providing an overview of the law pertaining to public interest mergers, as well as a brief reflection

¹ Hereafter, 'the CMA'.

on how public interest issues have traditionally been accommodated under UK merger control. Section 3 considers the two perceived weaknesses in turn. Firstly, it explores the merits of the Secretary of State's ability to propose new public interest considerations by virtue of their residual power under s 58(3) of the 2002 Act. Secondly, the effectiveness of the current institutional arrangement is analysed, with particular emphasis afforded to the ability of the Secretary of State to afford adequate consideration to both competition and public interest concerns when making a decision. In particular, the Secretary of State's conduct in the key case of *Lloyds/HBOS* will be explored to determine the extent to which these weaknesses exist. Section 4 proceeds to assess the implications that these weaknesses are likely to have in practice, should the list of public interest exceptions be extended in the future. It draws the conclusion that s 58(3) could represent something of a 'ticking time bomb' for the stability of the wider merger control regime in the UK. Furthermore, it suggests that the UK regime does not make optimal use of the institutional resources at its disposal, which could ultimately lead to a renewal of a politically-driven assessment process. Finally, Section 5 concludes by proposing that steps should be taken to diffuse the threat posed by s 58(3) by imposing upon it formal restraints and clear guidance. It also suggests that the risk of biased decision-makers could be alleviated by requiring the Secretary of State to report any instances of lobbying, and by expanding the decision-making role to include a panel of politicians.

4.2. OVERVIEW OF THE PUBLIC INTEREST PROVISIONS UNDER UK MERGER CONTROL

As UK merger control has developed in recent decades, the degree of influence afforded to public interest criteria has – in the most part – been in decline. Indeed, this is an important trend to bear in mind as we consider the state of the current regime and the course it is likely to take in the future. If the current regime has acted to restrain the influence of public interest considerations, its ability to adapt to a resurgence in public interest exceptions will be crucial to its overall effectiveness in practice.

The first formal regulation of merger transactions in the UK was introduced by the Monopolies and Mergers Act 1965, which established a broad public interest test whereby mergers were to be assessed according to whether or not they were likely to operate against the public interest.² These mergers were assessed by an independent competition authority, the Monopolies Commission,³ but the final decision on whether or not to permit a transaction lay with the Secretary of State. This arrangement of a broad public interest test coupled with ministerial decision-making was to endure for 19 years in all, including under the merger provisions of the Fair Trading Act 1973.

The 1973 Act, although continuing to reference the public interest in its broad terms, did at least identify five relevant effects that the Monopolies and Mergers Commission (MMC) should take into account when determining whether a merger may be likely to operate against the public interest.⁴ These five criteria encompassed: (a) the maintenance and promotion of effective competition, (b) promoting consumer interests in respect of price, quality and choice, (c) promoting efficiencies through competition, (d) distributing industry and employment across the UK, and (e) maintaining and promoting the international competitiveness of UK firms overseas. ‘Competition’ itself makes a notable appearance as the first criterion on this list of considerations. Indeed, even though these five criteria were not ranked as part of a formal hierarchy, the fact that competition features in this list demonstrates that there was an appreciation of the benefits that competitive markets could bring to the wider public interest in addition to more directly observable social benefits. But, although the MMC was under a duty to consider each of these criteria when undertaking an assessment in the public interest, it is apparent that the criteria are not entirely compatible with one another. For example, promoting efficiencies through competition – criterion (c) – may see firms adopting more technology-based alternatives to human workforces, in direct contrast to the need to distribute

² Monopolies and Mergers Act 1965, s 6(2)(ii).

³ The Monopolies Commission was the predecessor to the Monopolies and Mergers Commission (MMC) and, subsequently, the Competition Commission.

⁴ Fair Trading Act 1973, ss 84(1)(a)-(e).

employment – criterion (d).⁵ Indeed, these five criteria were said to be inherently prone to issues of compatibility, given that they were so wide-ranging in nature.⁶ The reason for these wide-ranging criteria existing under the 1973 Act has been attributed to the fact that the UK Government was, at the time, seeking to give effect to a number of conflicting political discourses, which ultimately resulted in the broad public interest test becoming vague and unpredictable.⁷

The wide-ranging nature of the criteria was also prone to creating uncertainty in ‘marginal cases’ involving mergers that have only a negligible net impact on the public interest. By virtue of s 69(1)(b), the MMC was under a duty to assess whether the merger in question ‘operates, or may be expected to operate, *against* the public interest’.⁸ On this basis, if a merger were likely to prove either beneficial or neutral to the public interest, it would meet the conditions necessary for clearance. Some commentators have suggested that this assessment created an inbuilt bias in favour of merging firms,⁹ who ‘need only show that such [a] merger is unlikely to be *contrary* to the public interest’.¹⁰ Indeed, given that the burden of proof was actually on the MMC to demonstrate that the merger was likely to have an adverse effect, the position of the merging parties was even more favourable.¹¹ However, for firms involved in marginal cases, the wide-ranging nature of the criteria and their lack of compatibility could act to diminish the favourable treatment afforded to them as merging firms. In effect, where a merger was found to have a very negligible adverse effect on the public interest, the Fair Trading Act would compel the MMC to advise the Secretary of State

⁵ Stephan also notes that unemployment can be a side-effect of increasing efficiency and, as such, ‘allowing governments to step in simply to protect jobs can ultimately be counter-productive’. Andreas Stephan, ‘Did Lloyds/HBOS mark the failure of an enduring economics-based system of merger regulation?’ (2011) 62(4) Northern Ireland Legal Quarterly 539, 549.

⁶ Charlie Weir, ‘The implementation of merger policy in the U.K. 1984–1990’ (1993) 38 Antitrust Bulletin 943, 944.

⁷ Hubert Buch-Hansen, ‘The political economy of regulatory change: The case of British merger control’ (2012) 6(1) Journal of Regulation & Governance 101, 110.

⁸ Emphasis added.

⁹ Weir (n 6) 946.

¹⁰ Cynthia Day Wallace, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (BRILL 2002) 526.

¹¹ The parties to the merger would derive the burden of proof only *after* a finding of adverse impact by the MMC, which the parties would need to rebut.

to block that merger. There was no need for the MMC to demonstrate a ‘significant’ or ‘substantial’ adverse effect on the public interest; the issue of degree was irrelevant to the substantive test for assessment. Hence, mergers – which, in most cases, are anticompetitive to a greater or lesser extent – would seemingly need to facilitate additional benefits to consumer interests, efficiency, employment or international competitiveness in order to ‘neutralise’ its anti-competitiveness. This would, of course, create difficulties for firms whose merger would only facilitate such additional benefits in the long-term.

The practical application of the broad public interest test came to an end 1984 when Norman Tebbit MP, the then Secretary of State for Trade and Industry, made a statement before Parliament declaring a change to the assessment policy of the Fair Trading Act. Without seeking statutory reform, Tebbit announced that a new default position would see mergers assessed purely on the basis of their effect on competition.¹² This policy change, popularly referred to as the ‘Tebbit doctrine’, saw competition prioritised over wider social interests for the first time under UK merger control. Indeed, the doctrine was to prove so effective in practice that the four other public interest criteria within the Fair Trading Act were almost completely ignored by the MMC in favour of competition.¹³ The essence of the Tebbit doctrine was then effectively codified within legislation upon the introduction of the Enterprise Act 2002.

Among other notable changes, the Enterprise Act 2002 introduced a new economics-based test by which mergers were to be assessed; namely, the ‘substantial lessening of competition’ (SLC) test.¹⁴ Institutionally, the Enterprise Act sought to de-politicise the merger assessment process by removing the majority of decision-making powers from the Secretary of State and reassigning them to the UK’s two main independent

¹² *HC Deb 5 July 1984, vol 63, cols 213-14W.*

¹³ Weir (n 6) 962.

¹⁴ Specifically, s 22(1)(a) of the Enterprise Act imposes a duty on the stage-one decision-maker to refer, for further investigation, a merger that ‘has resulted, or may be expected to result, in a substantial lessening of competition’ within the relevant market.

competition authorities, the Office of Fair Trading (OFT) and the Competition Commission (CC). The Enterprise Act facilitated a two-stage assessment process involving each of these agencies, where – subject to proposing remedies – the OFT was under a duty to refer any merger resulting, or expected to result, in an SLC to the CC for Phase 2 assessment.¹⁵ As of April 2014, the respective roles of the OFT and the CC are performed by separate committees within the CMA; namely, by the CMA Board at Phase 1 and the CMA Panel at Phase 2.

Despite, however, the realisation of a strict competition-based approach to merger control undertaken and decided upon by an independent competition body, public interest criteria and political decision-making continues to subsist in a restrained role under the Enterprise Act. Where a merger is believed to raise specific public interest concerns, the Secretary of State may intervene in the assessment process and assume the decision-making powers of the CMA. When the Enterprise Act 2002 first received Royal Assent, only *national security* was explicitly specified as a public interest consideration under the legislation.¹⁶ Months later, a second named interest was inserted by the Communications Act 2003 that allowed for consideration to be had to issues relating to *media plurality*.¹⁷ In addition to these named interests, the Secretary of State also possesses a residual power to propose new public interest considerations by virtue of s 58(3) of the Enterprise Act 2002, which is explored in detail below. To date, the Secretary of State has only exercised this power on one occasion, in October 2008 in response to the *Lloyds/HBOS* transaction, to allow for the consideration of the need to *ensure the stability of the UK financial system*.¹⁸ The roles of the Secretary of State and the public interest in general are, therefore, very much restricted in comparison to their influence before the introduction of the Tebbit doctrine. Nevertheless, the fact that a role still exists for either – regardless of capacity – would

¹⁵ The duty to make such a reference is conferred by the 2002 Act under s 22(1) for completed mergers, and s 33(1) for anticipated mergers.

¹⁶ Enterprise Act 2002, s 58(1).

¹⁷ *ibid* s 58(2A)–(2C). These media plurality considerations include: (a) the need for accurate presentation of news and free expression of opinion; (b) the need for a sufficient plurality of views in each market for newspapers; and (c) the need for a sufficient plurality of media owners, committed to providing a range of quality broadcasting to UK audiences.

¹⁸ *ibid* s 58(2D).

seem to illustrate the importance that Parliament continues to attach to certain public interests in the context of merger control.

Buch-Hansen suggests that the evolution of UK merger control has, to a greater or lesser extent, been shaped by three distinct discourses:¹⁹ the *neoliberal*,²⁰ the *national mercantilist*,²¹ and the *center-left* discourses.²² He observes that the Tebbit doctrine marked a clear progression towards a neoliberal approach to merger control, which has ultimately led to the adoption of the Enterprise Act.²³ Recent proposals to extend the role of public interest considerations will be referenced under Section 4 of this chapter and, significantly, they demonstrate a belief in some quarters of mainstream commentary that the Enterprise Act has rendered merger control excessively neoliberal in the UK. With the UK regime having now deployed a strict competition-based approach to merger control for the last three decades, it is questionable whether it would be able to adapt to a renewed influence for public interest criteria. In particular, there are two weaknesses within the current merger regime which could leave the wider merger regime prone to instability should the public interest return to prominence in the future. These perceived weaknesses each relate to ministerial powers reserved by the Secretary of State in relation to public interest mergers; namely, (a) the Secretary of State's power to propose new public interests under s 58(3), and (b) the Secretary's exclusive power to make final decisions on public interest mergers. Both of these will now be scrutinised in turn.

¹⁹ Buch-Hansen (n 7) 114.

²⁰ Which supports the view that competition is always beneficial and, as such, merger control should not reserve a role for political decision-makers.

²¹ Where political intervention is considered a necessity and the competitiveness of key national companies and sectors is prioritised over competition.

²² Under this discourse, competition is seen as creating negative social consequences and, thus, merger control should consider only social policy effects; particularly employment.

²³ Buch-Hansen (n 7) 115.

4.3. TWO PERCEIVED WEAKNESSES OF THE UK PUBLIC INTEREST MERGER REGIME

4.3.1. Section 58(3) Enterprise Act 2002: The Secretary of State’s power to propose new public interest considerations

Since its inception under s 58(3) of the Enterprise Act, the Secretary of State’s power to propose new public interest considerations, in addition to those explicitly listed under s 58, has raised classic *when*, *what* and *why* questions. *When* and in what circumstances can the Secretary of State legitimately exercise this power? *What* type of public interest criteria can be proposed? And *why* is this power necessary as an alternative to creating new public interest criteria via statutory reform? As this section will demonstrate, there has been no straightforward answer to any of these questions. Indeed, given the relative lack of activity under s 58(3) and the absence of any formal guidance on how it is to be exercised, an uncertainty still surrounds the provision to this day. Ultimately, it is this uncertainty that leaves open the possibility of an influx of proposals for new public interest criteria in the future. To scrutinise the clarity of the power, in light of its intended meaning and its application in the *Lloyds/HBOS* merger, one can attempt to obtain an answer to each of the aforementioned questions.

4.3.1.1. *When and in what circumstances can the Secretary of State legitimately exercise section 58(3) Enterprise Act 2002?*

Taking the ‘*When can it be exercised?*’ question in the first instance, the general scope for the Secretary of State’s application of s 58(3) can be inferred from its wording:

Section 58 Specified Considerations

[...]

(3) The Secretary of State may *by order* modify this section for the purpose of *specifying in this section a new consideration or removing or amending any consideration* which is for the time being specified in this section.²⁴

²⁴ *Emphasis* added.

From the wording of the provision, the term ‘by order’ imposes an immediate restriction on the application of the provision by denoting the need for the Secretary of State’s proposal to receive Parliamentary approval, via affirmative procedure, before it can be considered.²⁵ As such, although the Secretary of State can propose a new public interest consideration, that consideration must be scrutinised and approved by both Houses of Parliament before the Secretary can intervene and apply that consideration to the merger in question. The scope of the s 58(3) power does, however, appear to be broadened by the fact that the Secretary of State may *remove* or *amend* any existing considerations under s 58, as well as *specify* a new consideration. This potentially has the effect of significantly widening the application of the power as it allows the Secretary of State to propose the removal of the ‘statutory-named interests’ – *national security* and *media plurality* – as well as considerations that have arisen from the previous exercise of s 58(3) – namely, *financial stability*. But aside from these clarifying phrases, one seemingly limiting the scope of s 58(3) and the other broadening it, the wording of the provision is plagued by ambiguity. In particular, it fails to shed light on the circumstances under which the power can be exercised legitimately; it merely clarifies that it cannot be exercised without the prior approval of Parliament. Indeed, in the absence of formal guidance, the source of further elaboration on the scope of s 58(3) is largely limited to Hansard and, in particular, the debates of both Houses of Parliament in the legislative scrutiny of the Enterprise Bill 2002.

One clear intention of s 58(3), that was reiterated by the Labour Government on several occasions during the legislative process, was that it would operate as a ‘necessary safeguard’ to provide flexibility in unforeseen circumstances.²⁶ This was made clear by Lord Sainsbury, the Labour peer and Minister for Science and Innovation, who succeeded in rebutting a proposed amendment to the Bill which

²⁵ Indeed, in exercising his or her power under s 58(3), the Secretary of State has a duty to refer the proposed public interest consideration to Parliament as soon as practicable; Enterprise Act 2002, section 42(7).

²⁶ HL Deb 15 October 2002, vol 639, col 801.

would have seen the removal of the clause that later became s 58(3). He justified the need for such a power by insisting that it ‘provides an important safety valve which will ensure that the very exceptional case can be dealt with appropriately’.²⁷ He proceeded to clarify that the power was a residual one ‘which could be used in unpredicted and extreme circumstances’.²⁸ Several years later in October 2008, when Lord Mandelson – the then Secretary of State for Business, Innovation and Skills – was appearing before the House of Lords to defend his proposal for introducing *financial stability* as a public interest consideration, his words echoed those of this fellow Labour peer. Mandelson sought to allay fears that the *Lloyds/HBOS* merger would open the floodgates to a wave of new public interest proposals by maintaining that section 58(3) was reserved for ‘exceptional circumstances where vital public interest issues are at stake’.²⁹ Collectively, these quotes from senior members of the Labour Government appear to show that s 58(3) was intended to be applied in a very restricted manner, where the merger in question created extreme and unpredicted circumstances that jeopardised vital public interests. This offers a degree of clarity on the wording of s 58(3) but, once again, this clarity is limited by the vagueness of the terminology adopted by Lords Sainsbury and Mandelson. ‘Extreme’ and ‘vital’ are, in particular, conditions that are very much subjectively defined. Certainly, they describe a set of circumstances that are very rarely observed in merger control assessments. But, nonetheless, they are terms which politicians use to describe a host of different interests on a daily basis. Relying on subjective terminology to clarify a vague statutory provision is very much counterproductive from a legal certainty perspective.

Hansard may, however, provide a further source of evidence regarding *when* s 58(3) may legitimately be exercised. Once again in the House of Lords debate on the proposed introduction of the *financial stability* consideration, Lord Borrie, the former Director General of Fair Trading at the OFT, enquired as to whether the level of

²⁷ HL Deb 18 July 2002, vol 637, col 1466.

²⁸ *ibid* col 1498.

²⁹ HL Deb 16 October 2008, vol 704, col 864.

‘urgency’ had changed for use of the consideration to assess the *Lloyds/HBOS* transaction.³⁰ His reason for asking this question related to the fact that both banks that were party to the proposed merger were set to receive Government grants to stabilise their respective financial situations which, according to Lord Borrie, may have rendered the purpose of the merger unnecessary. Is ‘urgency’ therefore a necessary condition in the application of s 58(3)? If so, it may imply that s 58(3) is only intended to be exercised at short-notice to mergers that have already been announced. This would prevent the Secretary of State from seeking to finalise long-term public interest considerations in advance, as there would be no pressing urgency in the absence of a relevant merger. On this basis, it is interesting to consider the meaning behind another of Lord Sainsbury’s quotes; namely, his indication that s 58(3) enables the UK regime to deal with ‘uncertainty about issues that we cannot today foresee’.³¹ Indeed, there are two different ways of interpreting this.

On the one hand, Lord Sainsbury’s comment can be interpreted in its literal sense to imply that s 58(3) can be used to deal with public interest issues that were not foreseen at the time the Enterprise Bill was being debated in Parliament. Under this interpretation, the Secretary of State would be able to exercise his power to propose new public interest considerations as and when they became foreseeable, and regardless of whether or not a merger has been proposed that raises such concerns. On the other hand, Lord Sainsbury may have been referring to ‘today’ in its fluid sense, meaning that s 58(3) is only intended to be used as and when new public interest concerns are raised by *tomorrow*’s mergers. In light of the prompt finalisation of the *financial stability* consideration in advance of the *Lloyds/HBOS* merger, we have witnessed the ability of s 58(3) to respond to concerns at short-notice; which is consistent with the latter interpretation of Lord Sainsbury’s comment. But at no stage during the Parliamentary debate is mention made of whether or not s 58(3) can be

³⁰ *ibid* col 857.

³¹ HL (n 26) col 801.

exercised in advance of a merger.³² This marks a blatant gap in the debate that scrutinised the provision under the Enterprise Bill. As a consequence, it is unlikely that we will be certain of the true scope of s 58(3)'s application until a Secretary of State attempts to propose a new public interest in the absence of a merger. Indeed, in addition to the circumstances under which s 58(3) can be exercised, this uncertainty also creates doubts regarding the types of public interest considerations can be proposed under the provision.

4.3.1.2. What type of public interest considerations can be proposed?

The variety of public interest considerations that are capable of being finalised under s 58(3) is likely to depend a great deal on the circumstances under which the provision can be exercised. As one would expect, a power that is only intended to be exercised at short-notice will, in the most part, only tend to deal with short-term public interest concerns; albeit concerns that would likely create long-term problems, if left unaddressed. Alternatively, a power that allows for public interest considerations to be specified ahead of time may allow long-term public interest goals to be pursued in addition. The uncertainty surrounding the extent of s 58(3)'s application hinders our ability to effectively envisage the nature of the public interest considerations that it could give rise to in the future. Section 58(4) does, however, specify the following elaboration:

- (4) An order under this section may, in particular –
 - (a) provide for a consideration to be specified in this section for a particular purpose or purposes or for all purposes; [...]

To proclaim that the public interest consideration in question may seek to address ‘a particular purpose or purposes or for all purposes’ implies that the consideration may

³² The same is true of s 58(4)(b) of the Enterprise Act 2002 which, despite confirming that the Secretary of State can intervene in a merger that is currently under consideration by the CMA and Ofcom, does not specify whether s 58(3) can be exercised in advance of a merger proposal.

itself vary in scope. Examples of this varying scope are observable under the current specified interests listed under s 58. Both *national security* and *financial stability* are referred to in general terms, whereas *media plurality* is attributed an explicit list of requirements under s 58(2A) – (2C), including the need to ensure a sufficient plurality of control in media markets and the availability of high quality and wide-ranging broadcasting. Furthermore, the provisions relating to *media plurality* are very much representative of the wider UK policy to achieve long-term plurality in media markets.³³ In fact, both *media plurality* and *national security* bear the traits of more long-term public interest goals, and both have been inserted into s 58 via traditional legislative reform rather than via s 58(3). Lyons emphasises this point in reference to the *Lloyds/HBOS* merger where he notes that ‘national security and media plurality are appropriately long-term considerations for a merger, whereas this merger’s contribution to financial stability could only have been short-term at best’.³⁴ Indeed, Lyons appears to view *financial stability* as an anomaly, at least in the context of the *Lloyds/HBOS* merger, given that it offers a ‘quick fix’ to an important public interest concern. One could therefore infer that s 58(3) is reserved for proposing public interest considerations that seek to reach short-term aims, whereas considerations that achieve long-term aims must be inserted via more traditional channels of legislative procedure. Then again, now that *financial stability* has been inserted under s 58 and has been relied upon in practice, who is to say that it cannot be relied upon to intervene in a merger that raises long-term, rather than short-term, threats to the stability of the UK financial system?

Parliamentary debate of the Enterprise Bill has at least sought to provide some examples of the types of public interest considerations that s 58(3) may give rise to. Providing such examples did, however, prove difficult for certain members of the Labour Party, much to its embarrassment. In particular, when Labour’s Melanie Johnson – the Minister for Competition, Consumers and Markets – was unable to

³³ As ownership is such a key aspect of achieving this plurality, merger control appears to be an effective tool in which to facilitate this long-term goal.

³⁴ Bruce Lyons, ‘Competition Policy, Bailouts, and the Economic Crisis’ (2009) 5(2) Competition Policy International 25, 47 (fn 47).

provide an example when requested, it prompted the Conservative MP Nigel Waterson to somewhat cruelly declare that ‘[w]e do not know what the Government have in mind, which is understandable because *they* do not know what they have in mind’.³⁵ Lord Sainsbury later conceded that it was impossible to predict the precise type of public interest consideration that might arise under s 58(3); indeed, had an interest been predictable, it would have been explicitly listed under s 58. However, he does attempt to offer a broad example of when s 58(3)’s flexibility may prove beneficial:

Let us suppose that some new technology is essential to large parts of the British economy and the possibility exists that some company will be able to get control of it. It might be difficult to say that that relates to national security, but the *economic security of the country* might be involved.³⁶

The defined scope of ‘national security’ is explored elsewhere in this thesis, but Lord Sainsbury’s suggestion that the UK’s *economic security* could warrant consideration in the future serves to highlight the breadth of the types of considerations that can be proposed under s 58(3). Rather than offering an example of a consideration that seeks to protect the interests of a specific market, he suggested that something as expansive as the economic security of the UK could hold merit under the provision. This goal appears to be much more comparable to the long-term goals of *national security* and *media plurality* and, as such, would suggest that s 58(3) is equally accommodating to proposed considerations that provide both ‘quick fixes’ and long-term protection.

In reality, it is very difficult to predict the types of considerations that s 58(3) may give rise to in the future. As has been noted at an earlier stage of this thesis, the public interest is an abstract and fluid concept and, as such, is prone to change. What is deemed to be ‘in the public interest’ today may not be tomorrow, and vice versa.³⁷ But

³⁵ HC Deb 13 June 2002, vol 386, col 1102. Emphasis added.

³⁶ HL (n 27) col 1490.

³⁷ This logic is actually given effect to under the s 58(3) power, as it enables the Secretary of State to propose the removal of considerations, as well as the proposal of new ones.

as the opinions of Lord Sainsbury still hold true in terms of the current Government's intended use of s 58(3), the range of public interest considerations that could potentially be proposed under the provision would appear extensive. In theory then, the existence of s 58(3) allows for the possibility of the list of named public interest considerations being extended in the future, but with no robust estimate of how many new public interests will be listed, nor when they would be listed.

4.3.1.3. Why is s 58(3) necessary as an alternative to statutory reform?

One of the characteristics that many have found difficult to comprehend about section 58(3) is the fact that it essentially allows an Act of Parliament to be amended without the need to pursue primary legislative reform. Indeed, in constitutional law, s 58(3) might otherwise be termed as a 'Henry VIII clause', a provision within an Act of Parliament which enables the Government to use secondary (delegated) legislation to make amendments to the Act 'with or without further Parliamentary scrutiny'.³⁸ Where the Secretary of State proposes a new consideration under s 58(3), that consideration will be drafted into secondary legislation in the form of a Parliamentary order. This Parliamentary order is then subjected to an *affirmative procedure*, meaning it cannot come into force without the approval of both Houses. The affirmative procedure represents a higher hurdle for secondary legislation to pass through Parliament than would usually be anticipated. Other Henry VIII clauses either require no Parliamentary scrutiny or specify that the proposed secondary legislation will be subject to a *negative procedure*; namely where the draft legislation is passed unless either House votes against it. Given that any proposed addition to the list of public interest considerations under s 58(3) will be subject to the more rigorous affirmative procedure, there would appear to be an effective safeguard against any prospective influx of new interests being introduced. There are, however, doubts as to whether or not Parliamentary orders derived under s 58(3) will actually be exposed to

³⁸ 'House of Lords Select Committee on the Scrutiny of Delegated Powers', First report, HL 57, 1992-93, paragraph 10.

sufficient scrutiny in practice. In the House of Commons, for instance, the support from a majority Government would be sufficient to see the draft legislation approved. Even more significantly, because the affirmative procedure does not allow for amendments to be made to the draft legislation, the House of Lords (which considers its role to be that of a revising chamber) will very rarely fail to approve an order under this procedure.³⁹ The affirmative procedure cannot, therefore, be guaranteed to facilitate even a basic level of Parliamentary scrutiny. At the very least, one would hope that new proposals for public interest considerations would be subject to a level of scrutiny comparable to that observed when debating primary legislation. It seems somewhat illogical for ‘national security’ and ‘media plurality’ to each be subjected to the intense scrutiny of primary legislation, when ‘financial stability’ has also been introduced as a named interest without being debated to the same degree. Indeed, legislators have often been criticised for inserting Henry VIII clauses into statute, as they adversely affect the quality of scrutiny and can ‘undermine the constitutional foundations of the process by which law is made’.⁴⁰ A sufficient level of scrutiny seems particularly necessary, in the merger control context, when one considers the likelihood of which s 58(3) proposals can overlap with interests in other key policy areas. What, then, justifies the existence of s 58(3) as a Henry VIII clause?

When s 58(3) was still being debated under the Enterprise Bill, Nigel Waterson MP questioned the purpose of the power as a ‘safety valve’, suggesting that ‘[i]f it is not possible to identify [public interest] considerations now and they arise later, it should be possible to add them to the Act, as it will be then, by primary legislation’.⁴¹ Lord Hunt went a step further by insisting that public interest considerations should only ever be specified and identified in primary legislation,⁴²

³⁹ House of Commons, ‘Brief Guide: Delegated legislation’ <<http://www.parliament.uk/documents/commons-information-office/Brief-Guides/Delegated-Legislation.pdf>> accessed 25 September 2015, 3-4.

⁴⁰ Matt Korris, ‘Standing up for Scrutiny: How and Why Parliament Should Make Better Law’ (2011) 64(3) *Parliamentary Affairs* 564, 568.

⁴¹ HC (n 35) col 1099.

⁴² HL (n 27) col 1466.

particularly in the light of the need for thorough scrutiny of each new consideration. Indeed, Lord Hunt showed no signs of adopting a more lax approach when scrutinising the order proposing the introduction of the *financial stability* consideration in October 2008.⁴³ Addressing Lord Mandelson, Lord Hunt proclaimed ‘[w]e in this House assure colleagues in the other place that we intend to hold the noble Lord and his fellow Ministers fully to account in this place’.⁴⁴ However, scrutiny of the *financial stability* consideration appears varied at best, with Lord Razzall rather profoundly declaring that ‘[t]his order will go through – only a lunatic would attempt to vote against it at this sensitive time’.⁴⁵

The concerns surrounding scrutiny would seemingly be alleviated if new considerations were enacted in primary legislation, rather than via s 58(3). However, one justification for retaining the secondary legislation approach is that it allows for a streamlined approach to be taken where time is of the essence; an option that would not generally be possible where Bills of Parliament are concerned. This is beneficial where action must be taken at short-notice to address pressing matters of the public interest.

Lord Hunt, however, has condemned the ability of s 58(3) to be applied to on-going mergers because of the unfairness and uncertainty it breeds. He has suggested that the power effectively gives the Government ‘an opportunity to move the goalposts when the game is in process’,⁴⁶ which is a criticism that is often expressed in relation to the uncertainty created under the broad public interest test of the Fair Trading Act 1973. Given that certainty is essential for maintaining the incentives for firms to merge, regular exercise of s 58(3) could significantly deter merger activity in the UK, which is very undesirable from an economic efficiency perspective. Yet, short of the Government guaranteeing some form of

⁴³ Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008.

⁴⁴ HL (n 29) col 852.

⁴⁵ *ibid* col 855.

⁴⁶ HL (n 27) 1489.

compensation for firms whose merger has been blocked as a result of s 58(3), this perceived ‘unfairness’ is likely to persist under the provision.

4.3.2. The decision-making role: The Secretary of State’s exclusive power to rule on mergers raising public interest considerations

Having considered some of the key shortcomings associated with the s 58(3) power, we may now consider the second major weakness of the public interest merger procedure; namely, the Secretary of State’s exclusive decision-making power over public interest mergers. This exclusive power is problematic for a number of reasons, not least with regards to consistency between decisions and, crucially, the ability of the Secretary of State to afford adequate consideration to both competition and public interest concerns in reaching a decision.

Given that the Secretary of State position is subject to change with every new Government, and indeed any Cabinet reshuffle, there is a legitimate concern regarding the consistency between the respective approaches adopted by successive Secretaries. If the Secretary of State’s position changes on a regular basis, there may not exist an observable pattern between decisions and, as such, firms are less able to predict whether their transaction is likely to be subjected to intervention in the public interest. Moreover, if an intervention is made, the merging firms are equally uncertain of how the Secretary of State will approach the balancing of competition and non-competition interests in the assessment process. Wilks suggests that there is strong evidence to suggest that certain Secretaries of State have adopted a ‘softer approach’ to merger control in the past. Notably, he describes the Conservative MP Michael Heseltine’s time as Secretary of State for Trade and Industry as ‘an example of a more relaxed application of the law, with a stress on ‘competitiveness’ rather than ‘competition’’.⁴⁷ It is of little wonder, then, that the now Lord Heseltine has become a chief advocate for extending the scope of public interest considerations under the Enterprise Act

⁴⁷ Stephen Wilks, *In the Public Interest: Competition policy and the Monopolies and Mergers Commission* (Manchester University Press 1999) 226.

2002; something which is considered in Section 4 of this chapter. In any case, human subjectivity – whether conscious or otherwise – is a problematic reality of ministerial decision-making that can lead different individuals to apply the same law to different extremities.

In particular, a minister may be prone to ‘capture’, by allowing themselves to base their decision on self-interested grounds, rather than having regard to the wider public interest. The minister might find themselves ‘captured’ in a number of different ways. On the one hand, they may feel an obligation to reach a decision that is in the best interests of the industry in which the merger is taking place. This perceived obligation may arise, for example, as a result of lobbying from the industry or a history of having worked within the industry. On the other hand, the minister may feel obliged to permit a merger having been influenced by a lobbyist from one or both of the merging parties. Finally, ministers might find themselves caught by their own personal ambition, and so will make a decision that maximises their chances of job retention or re-election.⁴⁸ This form of capture, in particular, highlights the concern of ministers pursuing short-term goals over long-term goals when exercising their quasi-judicial function.

It is not, however, altogether clear what is expected of the Secretary of State when he or she performs this quasi-judicial role. The 2012 Leveson Report,⁴⁹ outlining the key findings of Lord Leveson’s inquiry into UK media culture and practices, sought to define the requirements of this role. The report finds that the quasi-judicial role requires the Secretary of State to: (a) exercise procedural propriety,⁵⁰ and (b) adhere to the six broad principles of fairness outlined by Lord Mustill in *R v Home Secretary ex p Doody*.⁵¹ These six principles encompass the following: (1) Power should be exercised fairly; (2) The standards of fairness are subject to change over time; (3)

⁴⁸ Michael E Levine and Jennifer L Forrence, ‘Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis’ (1990) 6 *Journal of Law, Economics and Organization* 167, 169.

⁴⁹ Lord Leveson, *The Leveson Inquiry: An Inquiry into the Culture, Practices and Ethics of the Press* (Independent report, 2012).

⁵⁰ Derived from the decision in *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374.

⁵¹ [1994] AC 531, 560.

Fairness depends on the context of the decision; (4) The statute conferring the power is indicative of context; (5) Fairness will usually entail that those adversely affected by the decision will have the opportunity to make representations; and (6) Fairness usually requires interested parties to be made privy to the ‘gist’ of the case. Referencing these requirements, Lord Leveson said that there was ‘a degree of flexibility’ in how the Secretary of State chooses to approach to the quasi-judicial role.⁵² He did, however, clarify that the minister’s decision must be their own rather than of the collective Cabinet,⁵³ and that any decision would be subject to an objective test for bias.⁵⁴ Interestingly, Lord Leveson also noted that the Secretary of State is entitled to have a prior opinion on the proposed merger, so long as they were able to put this opinion to one side during the decision-making process.⁵⁵

This comment was particularly relevant to the events of the proposed *NewsCorp/BSkyB* merger of 2010, which posed many questions on the subject of potential bias within the quasi-judicial decision-making process. Vince Cable MP, the Secretary of State for Business, Innovation and Skills, was initially assigned the decision-making task, only to be stripped of the role after making comments to undercover reporters of *The Daily Telegraph* regarding his intentions to “declare war on Rupert Murdoch”.⁵⁶ Cable’s replacement as decision-maker was Jeremy Hunt MP, the Secretary of State for Culture, Media and Sport. Hunt was known to have expressed sympathy towards the merger during Dr Cable’s original assessment but, as has been mentioned, this opinion alone would not have had the effect of compromising his decision-making role, provided he did not allow it to influence his final decision. Controversially, however, a special advisor to Mr Hunt was also in direct private contact with Frédéric Michel, News Corp’s Director of Public Affairs and chief

⁵² Leveson Report (n 49) vol.3, Chapter 6, paragraph 2.14.

⁵³ *ibid* [at 2.16].

⁵⁴ *ibid* [at 2.14]. The objective test is that adopted in *Porter v Magill* [2002] 2 AC 357, paragraph 103.

⁵⁵ *ibid* [at 2.15].

⁵⁶ Robert Winnett, Andrew Porter and Holly Watt, ‘Vince Cable stripped of responsibility for media competition after Rupert Murdoch comments’ (*The Telegraph*, 21 December 2010) <<http://www.telegraph.co.uk/news/politics/liberaldemocrats/8218006/Vince-Cable-stripped-of-responsibility-for-media-competition-after-Rupert-Murdoch-comments.html>> accessed 25 September 2015.

lobbyist on the takeover bid, throughout the assessment process.⁵⁷ On the matter of his approach to the assessment of the *NewsCorp/BSkyB* merger, the Leveson Report praises Jeremy Hunt for his scrutiny, particularly with regards to the advice submitted by Ofcom.⁵⁸ But crucially the Report also concluded that, by allowing himself to become too close to Mr Michel, Hunt had compromised the quasi-judicial procedure. Lord Leveson explained that, had a rival firm challenged the decision to allow the merger to proceed by making a judicial review claim, Mr Hunt would have been legally obliged to disclose the email correspondence of his discussions with Michel. This, in Leveson's opinion, would have provided a 'powerful argument' for the existence of objective bias, and may have resulted in the judicial review claim being accepted by the Competition Appeals Tribunal (CAT).⁵⁹

The *NewsCorp/BSkyB* case certainly exposes some of the pitfalls and sensitivities of undertaking the quasi-judicial decision-making role in the media sector. The distinctive characteristics of the media industry, including its reliance on communication and journalistic sources, make it an ideal environment in which interest groups can lobby decision-makers and expose them to undue influence. Despite this, however, the Leveson Inquiry saw a strong consensus in support of ministers retaining a role in the decision-making process with regards to media mergers raising public interest concerns.⁶⁰ This consensus was predominantly established on a constitutional premise, namely that decisions relating to the public interest should be made by public-elected officials. Remarkably, Jeremy Hunt provided a rare dissenting voice, suggesting that politicians should not make decisions in media mergers because, under this approach, the public would not perceive justice to have been served.⁶¹ Instead, he proposed that such decisions should be taken by independent regulators, although he falls short of clarifying whether this should be a

⁵⁷ Leveson Report (n 49) vol.3, Chapter 6, paragraph 1.3.

⁵⁸ *ibid* [at 5.196].

⁵⁹ *ibid* [at 5.197]. Lord Leveson did, however, accept that a judicial review applicant would not have been privy to this inside information, so would be taking a risk in making a claim for judicial review [at para 5.198].

⁶⁰ The Labour Party leader, Ed Milliband, and Vince Cable were each of this opinion. *ibid* [at 6.2 and 6.4 respectively].

⁶¹ *ibid* [at 6.4].

task for the CMA or a separate independent body. In outlining his recommendations on how media public interest mergers should be approached in the future, Lord Leveson chose to concur with the majority consensus and advised that the Secretary of State should retain a decision-making role.⁶² He did, however, further recommend that the Secretary of State should be made to explain his reasoning wherever s/he chooses to depart from the advice of the CMA or Ofcom.⁶³ To avoid a repeat of the conduct witnessed in *NewsCorp/BSkyB*, it was also recommended that measures be put in place to ensure that any instances where the Secretary of State is lobbied is recorded and published.⁶⁴

Despite Lord Leveson's eventual conclusions, Jeremy Hunt's suggestion that media public interest mergers be decided upon by independent regulators is an intriguing idea. Would national competition authorities (NCAs), such as the CMA, provide a reasonable alternative to politicians in the quasi-judicial role? As a starting-point, we might consider the reasons why politicians felt the need to delegate the majority of their decision-making powers to NCAs in the first instance. Political science scholars have often cited the rationale of this power delegation as a means of facilitating greater transparency, plurality and credibility within the decision-making process.⁶⁵ Indeed, despite the fact that they have not been elected by the public, the decisions which NCAs arrive at are usually considered procedurally legitimate because of, for instance, the openness of their procedure, their consistency and the expertise they possess.⁶⁶ A more sceptical theory of the reason why politicians have delegated powers to NCAs is that it served as a mere symbolic gesture, whereby NCAs appeared to have a constitutional significance and government needed to be seen to recognise that fact.⁶⁷ It implies that Government had never intended for NCAs to play a major role in developing policy and, yet, they have achieved this to a great extent through the

⁶² *ibid* [at 6.11].

⁶³ *ibid*.

⁶⁴ *ibid*.

⁶⁵ Mark Thatcher, 'Regulation after delegation: independent regulatory agencies in Europe' (2002) 9(6) *Journal of European Public Policy* 954, 958.

⁶⁶ *ibid*.

⁶⁷ Stephen Wilks and Ian Bartle, 'The Unanticipated Consequences of Creating Independent Competition Agencies' (2002) 25(1) *West European Politics* 148.

exercise of their delegated decision-making power. This latter, more sceptical proposition may not hold true in the UK merger control context, however. If the UK Government had intended to delegate the Secretary of State's decision-making powers for mere symbolic purposes, why did it feel the need to reserve a limited decision-making role for politicians in public interest mergers? The more likely explanation for retaining this limited power is that the Government foresaw the constitutional importance of putting public interest decisions in the hands of elected representatives; just as it had recognised the constitutional importance of assigning competition-related assessments to those with expertise in the field.

That said, are politicians automatically better placed to make a legitimate decision on the public interest purely on the basis of their elected status? As has been noted in the context of pure competition cases, the decisions of NCAs are not only seen as legitimate in spite of their unelected status, they are seen as legitimate *because* of their unelected status. Their independence and procedural transparency are traits which often set NCAs apart from senior politicians when undertaking a decision-making role. NCAs are, of course, also prone to the risk of regulatory capture, particularly in relation to the 'revolving door' dilemma, where the personnel within an NCA include a high proportion of former industry workers. These individuals, who are likely to appreciate the unique attributes of the industry in question, may be biased in favour of reaching a decision that benefits the industry, rather than one which benefits the public at large.⁶⁸ But given the plurality of decision-makers within an NCA, group decision-making should – in theory at least – alleviate the risk of capture. Moreover, literature assessing the effectiveness of decision-making in different scenarios have found group decision-making to be favourable to decisions taken by a single individual.

Furthermore, if the decision were to rest with a *group* of individuals, any changes in personnel would only be likely to result in a marginal change of approach, given that

⁶⁸ Ernesto Dal Bó, 'Regulatory Capture: A Review' (2006) 22(2) Oxford Review of Economic Policy 203, 214.

continuity is achieved by the presence of the incumbent members. Long-term consistency between decisions would therefore be better facilitated where multiple decision-makers are present.

Wherever an intervention is made, it is essential that the consequent assessment process allows for a thorough balancing of competition interests against public interest concerns before any decision is reached on whether or not to proceed with the merger. If a thorough balancing act is not conducted, the potential for errors to arise increases which could lead to important public interest concerns going unaddressed or competition becoming needlessly stagnated. For an effective balancing act to take place, the decision-maker should be able to appreciate the importance of both sets of interests; only then is he able to afford each the consideration they warrant.

A number of common characteristics cast doubt on the ability of politicians and, indeed, any single individual to afford adequate merit to both competition and public interest considerations within the decision-making process. At the very least, the Secretary of State would require expertise in competition policy, an informed knowledge of wider social goals and an economic understanding of the dynamics that link the two. As has been alluded to in the previous chapters of this thesis, our ability to directly compare competition and non-competition interests is impaired by the fact that the former is generally modelled as a quantitative value, whereas the latter is more qualitative in nature.⁶⁹ The task for the decision-maker is therefore to undertake a somewhat arbitrary balancing act between these different sets of interests, meaning that it is vital that the decision-maker is able to comprehend the economic and public interest issues at play. Many Secretaries of State have, in the past, demonstrated a very solid understanding of the importance of competition, which certainly increases their competence to undertake this assessment. But the fact remains that the task is analogous to comparing apples to oranges; this is intrinsically part of the process, regardless of the Minister's comprehension of the factors at play in each case. Indeed,

⁶⁹ It is possible to assign quantitative economic values to public interest concerns but, even where this is possible, that economic value may still not be directly comparable with the competition value.

there is a particular note of irony in the fact that the Secretary of State is legally bound to accept the competition findings of the CMA when undertaking a public interest assessment;⁷⁰ the Secretary of State may well be under a duty to accept these findings but there is no requirement for him to understand and appreciate their significance.

A further potential problem with the Secretary of State's decision-making role relates to the exercise of his s 58(3) power. If a new consideration is finalised having been proposed under s 58(3), it is interesting to consider whether the Secretary of State would feel duty-bound to prioritise the new public interest consideration over competition in lieu of a balancing act. When scrutinising the proposed introduction of *financial stability* under s 58, Lord Borrie explicitly asked Lord Mandelson whether he would 'retain an open mind on whether he should rule that [financial stability] should trump the competition concerns' in the *Lloyds/HBOS* case.⁷¹ Lord Mandelson gave assurances that he did indeed remain open-minded to both competition and public interest considerations,⁷² but his eventual decision to permit the *Lloyds/HBOS* merger on public interest grounds means we cannot be certain of whether this was the case or not. Given that the new public interest exception would have been proposed by the Secretary of State in the first place, it is natural that the Secretary of State would feel somehow compelled to afford specific weight to that exception when undertaking their assessment. As cynical as this suggestion may seem, it is again a risk one takes when affording exclusive decision-making powers to a single individual.

4.4. IMPLICATIONS OF EXTENDING THE PUBLIC INTEREST CRITERIA

Having assessed the effectiveness of the s 58(3) power and the Secretary of State's exclusive decision-making role, it is evident that there exist a number of inherent problems with each that could lead to harmful repercussions in practice. Section 58(3) suffers from a lack of formal guidance regarding the circumstances under which it can

⁷⁰ Enterprise Act 2002, s 54(7).

⁷¹ HL (n 29) col 857.

⁷² *ibid* col 862.

be exercised and, in addition, appears to have the potential to give rise to a broad range of new public interest considerations in the future. It also fuels further uncertainty for firms given that it is capable of being applied to mergers that are on-going. Equally, the uncertainty induced by s 58(3) is further compounded by affording sole decision-making powers for public interest mergers to the Secretary of State. Inconsistencies between the decisions of different Secretaries – and the inability of politicians to afford reasonable appreciation to the importance of both competition and public interest concerns – creates an environment where the outcome of decisions becomes much less predictable. However, although these problems are significant in principle, the adverse effect they have had in practice has been limited by the fact that there has been minimal activity under s 58(3), and very few public interest interventions in general. Indeed, it appears as though the UK merger regime is able to facilitate a sufficient degree of certainty and predictability provided the level of public interest interventions remains at the current low rate. However, should the UK merger regime witness an influx of new public interest considerations in the future, these two weaknesses will constitute a ‘breaking point’ which may ultimately lead to the collapse of the regime’s effectiveness and credibility. In particular, s 58(3) could represent something of a ‘ticking time bomb’ for the stability of the wider merger control regime in the UK. Moreover, the fact that the UK regime does not make optimal use of the institutional resources at its disposal could inadvertently usher in a return to a more politically-oriented assessment process.

Calls for the UK Government to extend the influence of public interest considerations in merger assessments have tended to follow two distinct roots: (i) to increase the number of listed considerations under s 58,⁷³ and (ii) to return to a broad public interest test, similar to that adopted under the Fair Trading Act 1973. The latter would require statutory reform to depart from the default competition-based assessment that we currently see implemented under the Enterprise Act 2002.

⁷³ Either by way of statutory reform or through the exercise of s 58(3).

Such a departure seemed to be on the cards at one stage, with several senior politicians calling for a return to a broad public interest approach in the aftermath of the *Kraft/Cadbury* merger.⁷⁴ In 2010, Kraft Foods, the American grocery manufacturer, launched a successful takeover of UK-based confectioner Cadbury. At the pre-authorisation stage, Kraft made a commitment to maintain operations at Cadbury's Somerdale factory in the West of England, which Cadbury had been in the process of closing down. The commitment was particularly attractive given that it would ensure the continued employment of some 400 workers at the plant. However, once the takeover had been completed and Kraft's management were in a position to speak to Cadbury about the planned closure, it became apparent that keeping the Somerdale plant open was not financially viable. The subsequent review did not, however, conclude the need to reintroduce the public interest test, which has prompted some to suggest that 'it seems unlikely that deep change, involving a break from the neoliberal ideas informing British merger control, is about to take place'.⁷⁵ This view seems to have been corroborated by the explicit removal of the public interest provisions from the agenda for reform under the recent Enterprise and Regulatory Reform Act 2013.⁷⁶

Calls to extend the scope of the public interest in UK merger control were once again catalysed in 2014, when US pharmaceutical giant Pfizer launched an ultimately unsuccessful bid to acquire its UK-listed counterpart AstraZeneca for £69 billion

⁷⁴ The Deputy Leader of the Liberal Democrats at the time, Vince Cable MP, was a vocal advocate of reintroducing a broad public interest approach; see Graeme Wearden, 'Public interest test for takeovers should be reintroduced, says Vince Cable' *The Guardian* (London, 10 February 2010) <www.guardian.co.uk/business/2010/feb/10/vince-cable-test-takeovers-public-interest> accessed 13 June 2013. This position was reproduced in the party's 2010 General Election manifesto later that year; UK Liberal Democrat Party, 'Change that Works for You: Building a fairer Britain' (Liberal Democrat 2010 General Election Manifesto, April 2010) 26 <www.politicsresources.net/area/uk/ge10/man/parties/libdem_manifesto_2010.pdf> accessed 31 May 2016. One of the more novel proposals for reforming the public interest provisions came courtesy of the Eurosceptic right-wing UK Independence Party, whose manifesto pledged to create a 'British Register' that would seek to shelter specific British companies from foreign takeovers; UK Independence Party, 'Empowering the people' (UKIP 2010 General Election Manifesto, April 2010) 13 <<http://www.politicsresources.net/area/uk/ge10/man/parties/UKIPManifesto2010.pdf>> accessed 31 May 2016.

⁷⁵ Buch-Hansen (n 7) 114.

⁷⁶ Indeed, upon launching the consultation for reform, the Government explicitly indicated that it had 'no plans to change the role of Ministers in relation to the merger cases raising public interest considerations'. Department for Business Innovation and Skills, 'A Competition Regime for Growth: A Consultation on Options for Reform' (Consultation document, BIS 2011) para 4.9.

(US\$117 billion).⁷⁷ The *Pfizer/AstraZeneca* case saw much discussion revolve around the possible adverse impact that the merger could have on the UK's science base, particularly in light of Pfizer's questionable track record for asset-stripping and cutting investment in Research and Development (R&D). Although the Government sought extensive commitments from Pfizer regarding, inter alia, investment in R&D and restrictions on redundancies,⁷⁸ the Government's negotiating position was weakened by the fact the merger would have amounted to having a Union dimension under the EU Merger Regulation and, as such, it would have fallen to the European Commission to assess it on competition grounds.⁷⁹ In theory, the UK Government could have submitted an Article 21(4) EUMR notification, in an effort to regain the jurisdiction to rule on the public interest elements of the case (namely, protecting the R&D in the UK's science base). However, as we discovered in Chapter 3 (Section 3.5), the Commission has adopted a narrow interpretation of what constitutes a 'legitimate interest' under Article 21(4) EUMR, meaning the prospect of the Government successfully arguing 'protecting the UK science base' as a legitimate public interest ground seemed remote. Indeed, had AstraZeneca decided to accept the takeover bid from Pfizer, it seems unlikely that the Government would have been able to put up any tangible resistance under its competition laws.

Despite the UK public interest provisions having come through the *Kraft/Cadbury* and *Pfizer/AstraZeneca* cases with no signs of reform, the prospect of the public interest considerations being extended in the foreseeable future is still a possibility by virtue

⁷⁷ Once again, Vince Cable – who was by now Business Secretary in a Conservative-Lib Dem Coalition Government – was a key figure in the debate surrounding reform of the public interest provisions. In contrast to his calls for a return to a broad public interest test in the aftermath of *Kraft/Cadbury*, Dr Cable was more restrained on the *Pfizer/AstraZeneca* debate, suggesting that the public interest should only be utilised as a 'last resort' in cases where bidders refuse to undertake satisfactory commitments to protect the national interest; Andrew Marr, Interview with Vince Cable MP, Secretary of State for Business, Innovation and Skills (London, 13 July 2014) <<http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/130701.pdf>> accessed 31 May 2016.

⁷⁸ For an overview of Pfizer's commitments and the Business Secretary's proposals to reform the UK Takeover Code as a result of the case, see David Reader, 'Pfizer/AstraZeneca and the Public Interest: Do UK Foreign Takeover Proposals Prescribe an Effective Remedy?' (2014) 10(1) CPI Antitrust Chronicle <<http://www.competitionpolicyinternational.com/pfizerastrazeneca-and-the-public-interest-do-u-k-foreign-takeover-proposals-prescribe-an-effective-remedy>> accessed 25 September 2015.

⁷⁹ For an overview of the European Commission's merger assessment procedure, see Section 3.2.2 of this thesis.

of s 58(3). If the UK were to witness an influx of new public interest considerations via s 58(3), the conditions it would create could well be similar to those of a broad public interest test. Competition would, of course, remain the default assessment criteria, but there would be an increased number of instances where the Secretary of State could intervene in a merger and, potentially, prioritise the public interest. This would be especially true if the influx of new public interest considerations included broadly defined interests – such as Lord Sainsbury’s *economic security* – which would be able to encompass a number of concerns in a number of different markets. As has been observed under Section 2 of this chapter, the UK gradually adopted ‘competition’ as its main basis for the assessment of mergers and, therefore, if it were to depart from a strict competition-based approach, one would imagine it doing so in a similar gradual fashion. Section 58(3) does, of course, allow for this possibility under the UK regime.

All manner of possible new public interest considerations have been suggested since the Enterprise Act 2002 first came into force; particularly as modern-day societal problems have revealed themselves. In addition to the concerns it raised regarding employment and foreign investment, the inquiry that followed the *Kraft/Cadbury* merger afforded a great deal of consideration to *food security* as a possible instance for political intervention.⁸⁰ *Employment* was itself a consideration that Baroness Turner had sought to include within the named considerations under s 58,⁸¹ a plea that was rebuked by Lord Sainsbury who believed it would ‘create barriers to market restructuring’ which he considered to be essential if ‘companies and markets are to remain dynamic and competitive’.⁸² A separate concern relating to employees was raised in 2004 when the OFT – acting under its s 57(2) duty to notify the Secretary of State of any potential public interest issues arising from a merger – informed the Secretary of State that it had received third party representations which requested that *pension rights* be added to the list of named considerations via s 58(3), in the *Scottish*

⁸⁰ Business, Innovation and Skills Committee, *Mergers, acquisitions and takeovers: the takeover of Cadbury by Kraft* (HC 2009-10, 234), Ev 48.

⁸¹ HL (n 27) col 1464.

⁸² *ibid* col 1466.

Courage/Carlsberg-Tetley case.⁸³ In terms of more prospective problems, others have queried the need for political intervention in mergers raising concerns regarding the *security of energy supply* in the coming decade;⁸⁴ a concern that is already afforded consideration in other domestic merger regimes.⁸⁵

One of the more controversial proposals to have come to the forefront of discussion in recent times is the need to protect *vital national interests* in core sectors; in other words, to maintain the *domestic ownership of strategic economic assets*. This appears to relate specifically to the assessment of foreign acquisitions which, although bringing many economic and social benefits to the UK, have courted controversy due to issues of national identity and the UK's ability to nurture British-owned firms that are internationally competitive. The topic has most recently been raised by Lord Heseltine in his Government-commissioned review of the UK's growth policy. Acknowledging the lack of activity witnessed under s 58(3), Heseltine suggests that '[s]ignalling a greater willingness to use the Enterprise Act powers will help to underpin the Government's negotiating efforts' with foreign investors where vital national interests are at stake.⁸⁶ He makes this recommendation in the hope that the Government would have no need to exercise these powers, but suggests that their mere existence might be enough to deter unwanted investments and ensure the UK's long-term industrial capabilities.⁸⁷ These proposals could be perceived as somewhat protectionist in nature, which is likely to be the reason why, of Lord Heseltine's 89 recommendations, this marked one of only five that the Government rejected outright.⁸⁸ In the Select Committee review that followed the *Kraft/Cadbury* merger,

⁸³ Office of Fair Trading, 'Anticipated merger of the Technical Services Divisions of Scottish Courage Limited and Carlsberg-Tetley Brewing Limited' (Decision document, OFT 2004) <www.offt.gov.uk/shared_offt/mergers_ea02/scotishcourage.pdf> accessed 22 October 2013, 8.

⁸⁴ Cosmo Graham, 'Public Interest Mergers' (2013) 9(2) *European Competition Journal* 383, 406.

⁸⁵ In South Africa, for example, both the national Competition Commission and the Competition Tribunal have deviated from the competition-based approach to impose conditions on the *IDC/Rio Tinto SA* merger in order to guarantee the provision of magnetite iron ore – a key component in the beneficiation of coal – to domestic firms.

⁸⁶ Department for Business, Innovation and Skills, 'No stone unturned: in pursuit of growth – Lord Heseltine review' (Independent report, BIS 2012), para 5.108.

⁸⁷ *ibid.* These proposals formed Recommendation 73 of Lord Heseltine's review.

⁸⁸ Department for Business, Innovation and Skills, *Government's response to the Heseltine review* (Cm 8587, 2013) 59.

Lord Mandelson was equally unconvinced that it was ‘either necessary or desirable’ to provide the Government with further powers to intervene in the public interest in cases involving potentially harmful foreign takeovers, aside from those already specified under s 58.⁸⁹ The Select Committee shared Lord Mandelson’s reservations but, nonetheless, suggested that the prospect of industrial policy considerations by ministers should be considered as part of a wider debate on the merger and takeover regulations.⁹⁰ The saga eventually culminated in the Government pursuing corporate governance reform, in the form of ‘Cadbury law’, which imposes stricter deadlines on the completion of deals. However, these measures have since been criticised for failing to allow sufficient time for effective due diligence to be exercised, something which could now be stifling UK merger activity.⁹¹ As such, and in spite of certain academics previously calling for corporate governance reform over merger control reform,⁹² a UK Government administration might yet look at the possibility of extending the public interest in order to address potentially harmful foreign takeovers. We cannot be sure whether the Government would look to do this by exercising s 58(3) on a case-by-case basis to protect strategically important markets, or by proposing a broad new consideration to protect *vital national interests*. Both courses of action appear to be possible under the current legislation and both create their own problems as regards legal certainty.

Given, therefore, the numerous proposals that have been put forward to extend the role of the public interest, is the UK regime now showing signs of departing from a strict competition-based approach? The Government’s response to the Heseltine Review and the absence of any reforms to the public interest provisions under the Enterprise and Regulatory Reform Act 2013 would suggest not. However, the effect that the introduction of the *financial stability* consideration has had on the wider merger regime is still a matter of debate. In particular, one might question whether the

⁸⁹ BIS (n 80) para 73.

⁹⁰ *ibid* paras 74-75.

⁹¹ Helia Ebrahimi, ‘Takeover Panel to review ‘Cadbury law’’ *The Telegraph* (London, 21 October 2012) <<http://www.telegraph.co.uk/finance/markets/9624417/Takeover-Panel-to-review-Cadbury-law.html>> accessed 25 September 2015.

⁹² Stephan (n 5) 548.

Lloyds/HBOS merger has acted to erode the ‘essence of competition’ under the Enterprise Act 2002 and whether, in addition, this has established a slippery slope for further public interest exceptions to be introduced.

Both Stephan and McElwee are equally dismissive of the suggestion that *Lloyds/HBOS* has had the effect of undermining the essence of the Enterprise Act, citing the function of s 58(3) as a safeguard for dealing with situations where a strict adherence to competition would lead to market failures. Rather than opening the floodgates to an influx of new criteria, Stephan actually suggests that the case ‘highlights the importance of restricting political interventions on public interest grounds to exceptional circumstances in specific industries’.⁹³ McElwee, however, suggests that the Secretary of State’s intervention in *Lloyds/HBOS* makes it ‘much easier for Ministers to do the same in the future’ and that the case ‘represents a critical collision point between politics and competition law – and one where politics appears to have asserted its primacy in quite a comprehensive way’.⁹⁴ This latter statement by McElwee is intriguing; does *Lloyds/HBOS* make intervention on public interest grounds easier? Rather than ‘ease’ the procedure, what *Lloyds/HBOS* actually shows is mere ‘possibility’; namely, the possibility of s 58(3) working in practice. Indeed, both authors make interesting observations with regards to the impact which *Lloyds/HBOS* has had on (a) the primacy of competition under the Enterprise Act, and (b) the ability of the Secretary of State to make public interest interventions. Neither author accepts that there exists an inverse correlation between (a) and (b), suggesting that, although the case demonstrates the ability of the Secretary of State to make an intervention, it does not imply that more interventions will be forthcoming in the future.⁹⁵ In truth, the *Lloyds/HBOS* case does not even show public interest intervention in its most common form, which is usually to block a merger that raises no competition concerns, rather than to permit an anticompetitive merger. It would

⁹³ *ibid* 541.

⁹⁴ Martin McElwee, ‘Politics and the UK Merger Control Process: The public interest exceptions and other collision points’ (2010) 9(1) *Competition Law Journal* 77, 88.

⁹⁵ Indeed, as some academics have suggested that financial stability within the banking sector represents the only legitimate cause for intervention, *financial stability* could constitute the first and last new public interest proposal under s 58(3). See generally Lyons (n 34).

therefore seem wise to avoid interpreting the significance of *Lloyds/HBOS* in terms of its implications for future activity under s 58(3). The UK appears to remain committed to a strict competition-based approach to merger control, for the time being at least.

Nevertheless, so long as the possibility exists for new public interest considerations to enter into the UK merger control regime, it is important to address the two key weaknesses outlined in the previous section of this chapter. Failure to do so could lead to lasting implications, which will inhibit the confidence that merging firms have in the wider UK regime. Particularly, commentators have identified four main obstacles that merger regimes adopting public interest criteria often face. These are namely: protectionism, party politics, the transition of quantitative to qualitative reasoning, and the question of ‘who decides?’ what is in the public interest.⁹⁶ In the context of s 58(3), the risks of protectionism and party politics are certainly foreseeable, particularly if the Secretary of State is lobbied by his peers or by third parties to propose new public interest considerations that serve a political agenda. In addition, the exclusive decision-making role of the Secretary of State acts to facilitate each of these four obstacles. The Secretary of State’s inherent political association will undoubtedly influence his decision to some extent and, again, there remain concerns regarding his competence to balance quantitative and qualitative values effectively.

If the public interest is extended under the current Enterprise Act regime, then s 58(3) can be seen as a ‘ticking time bomb’ in terms of the implications it is likely to have. Its main flaw lies in its complete lack of guidance regarding how and when it is to be exercised. This is what fuels the uncertainty surrounding its purpose as a safety valve, on the one hand, and as a potential slippery slope on the other. The CMA is rightly subject to a host of guidelines regarding how it is to conduct its assessment of mergers on competition grounds. This is perfectly acceptable in a regime that adopts a strict competition-based approach, where the overwhelming majority of mergers are

⁹⁶ Aeron Davis and others, ‘Takeovers and the Public Interest: Responsible Capitalism in Practice’ (2013) Policy Network Paper, 14 <<http://www.policy-network.net/publications/4435/Takeovers-and-the-Public-Interest>> accessed 25 September 2015.

assessed purely on the basis of their effect on competition. But when the role of the public interest is extended and more cases become subject to ministerial intervention, there is greater need for guidance on how the Secretary of State should exercise his power under s 58(3) and how he should conduct his assessment. If ministers begin to exercise s 58(3) to propose new considerations in less-than-exceptional circumstances and these proposals are finalised, there is a risk that Parliamentary scrutiny of s 58(3) proposals will be shown to be more lacklustre than its scrutiny of primary legislation.⁹⁷ Once Parliamentary scrutiny cannot offer an adequate safeguard, an environment will ensue whereby new public interest considerations are essentially ushered in ‘via the back door’. This is an alarming prospect for a merger regime that has sought to promote certainty and consistency through its competition-based assessment process. Moreover, given that the Secretary of State may intervene in on-going mergers, the existence of s 58(3) will prompt firms to second guess the legitimacy of their transactions by having to speculate on the possible effects of their transaction on an, as yet, unspecified public interest concern. The uncertainty that this would create for firms will mean that merger activity is likely to stagnate and, in turn, potential foreign acquirers may seek alternative investments in countries with a more robust and predictable domestic merger regime.

In terms of the Secretary of State’s exclusive power to make decisions in public interest mergers, the implications are equally severe. Even under current conditions, where public interest interventions are few and far between, many are concerned at the thought of a single individual having the responsibility of deciding on issues of critical national importance. If the number of named public interest considerations were to increase and, as such, the Secretary of State was having to balance competition and public interest concerns on a more regular basis, one cannot help but feel that the adherence to competition would be eroded. This comes amidst doubts regarding the Secretary of State’s ability to appreciate the importance of competition and the political pressures he is faced with. If the decision-making role were extended to

⁹⁷ Scrutiny would presumably be even more lax where the Government has a majority in the House of Commons.

provide additional parties with voting rights, these problems could be alleviated and competition would be afforded the consideration it warrants on a case-by-case basis. These parties could sit as part of the membership of a collective committee, charged with undertaking the balancing act that the Secretary of State is currently tasked with. The idea is by no means a new one. In the wake of the *Kraft/Cadbury* merger, Brendan Barber, the former General Secretary of Trades Union Congress, called for the establishment of an independent mergers and takeovers commission to assume the decision-making role.⁹⁸ A prominent centre-left think tank has also advocated for the complete removal of the Secretary of State from the decision-making process, but it doubts the credentials of the CMA to deal with matters in the public interest given its relative inexperience in deciding upon such issues.⁹⁹ It does, however, propose restructuring the CMA to establish a division that specialises in the investigation and enforcement of public interest grounds.¹⁰⁰ As well as civil servants, it suggests that this new division could be compiled of City Institutions as well as ‘representatives from industry, trade unions, consumers associations, law and academia’.¹⁰¹ Indeed, a public interest committee could overcome the skills and resources imbalance that is often associated with the current procedure. The idea of including the CMA within this committee would seem sensible, particularly given its expertise in competition enforcement. The reservations regarding its lack of experience and its ability to interpret the public interest are legitimate, but having been afforded new powers to consider public interest issues in market investigations under the Enterprise and Regulatory Reform Act 2013, this experiential gap could be bridged in time. To suggest that the Secretary of State’s decision-making role should be completely abolished is, however, premature. Ministers play an important role as elected representatives of the wider general public and, thus, are gatekeepers of the public interest. In the interests of democracy, it would be advisable for the Secretary of State

⁹⁸ Barber B, ‘Cadbury shows takeovers need reform’ *The Guardian* (London, 22 February 2010) <<http://www.theguardian.com/commentisfree/2010/feb/22/takeovers-reform-kraft-cadbury>> accessed 3 July 2013.

⁹⁹ Davis and others (n 96) 14.

¹⁰⁰ *ibid* 18. They also suggest the alternatives of establishing a ‘Public Interest Commission’, independent of Government, the Takeover Panel and the CMA, and introducing a larger and more independent body to replace the Takeover Panel.

¹⁰¹ *ibid*.

to retain a seat and a voting share on the committee. A multi-member decision-making panel of this kind would also help to alleviate the potential for inconsistencies to arise between the decisions of different Secretaries of State. This would be of particular benefit given that an increase in the number of named interests under s 58 Enterprise Act 2002 would most probably see more Cabinet Ministers taking decisions in their respective fields.¹⁰²

4.5. CONCLUDING REMARKS

This chapter has sought to expose two perceived weaknesses in the public interest provisions under UK merger control. With the prospect of a greater role being attributed to public interest concerns in the future, the chapter finds that these weaknesses could act to undermine the credibility and certainty of the wider merger regime, if they go unaddressed. In order to alleviate the threat posed by these weaknesses, measures should be taken now to reinforce the UK's commitment to a strict competition-based assessment of mergers. This can be achieved by providing detailed guidance on the intended application of s 58(3) Enterprise Act 2002 and ensuring that this guidance clearly limits the scope of its application to very exceptional and legitimate circumstances. Moreover, it is unclear whether Parliament would afford adequate scrutiny to new public interest grounds proposed under s 58(3), by virtue of the 'Henry VIII' clause bypassing some of the formal processes witnessed in primary legislative reform. To bridge this apparent shortfall, measures should be introduced to ensure that Parliamentary scrutiny of any new public interest grounds is at least comparable to the scrutiny afforded to proposals for new primary legislation.

The Secretary of State's sole decision-making power should be revisited in an effort to reduce the risk of capture. Potential avenues for achieving this may come in the form of imposing requirements on the Secretary of State to report any instances of

¹⁰² Traditionally, the Secretary of State for Business, Innovation and Skills has been charged with the task of deciding the outcome of public interest mergers.

lobbying that s/he has been subjected to. Alternatively, the decision-making role could be extended to include other politicians, thereby reducing the risks of capture by facilitating group decision-making. It is hoped that these measures will prevent a return to the uncertain conditions witnessed under the Fair Trading Act 1973 and that the UK merger regime will continue to facilitate an appealing environment for merging firms.

CHAPTER 5

Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights[†]

5.1. INTRODUCTION

To this point, the thesis has sought to draw insights on the role of the public interest in merger control by approaching the topic from two distinct perspectives. Chapter 3 considered the unique obstacles faced by the European Union, as a supranational entity, in giving effect to the legitimate interests of Member States and the wider public policy goals of the EU. Chapter 4 extended this discussion by tracking the evolution of the public interest under the domestic UK merger regime, charting how successive governments have struggled to strike a balance between facilitating competitive markets and protecting the public interest. This chapter approaches the topic from a third, broader perspective by considering the ways in which domestic states, from across the globe, have chosen to accommodate public interest considerations within their merger control regimes.

In the wake of advances in economic theory and global initiatives such as the International Competition Network's (ICN) Recommended Practices for Merger Analysis,¹ many jurisdictions have converged towards a competition-based approach to merger assessment.² This means, as a default position, most states will assess the majority of mergers according to their potential impact on competition within the

[†] The author is grateful for the feedback provided on earlier versions of this chapter by participants of the 9th Annual ACLE Competition & Regulation Meeting (Amsterdam), the 8th Competition Law and Economics European Network Workshop (Norwich), the 2014 Legal Research Methods and Methodologies Conference (Bristol), and the 2015 BAFL Postgraduate Research Workshop on Comparative Law (Norwich).

¹ International Competition Network, 'ICN Recommended Practices for Merger Analysis' (2009) <<http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf>> accessed 15 July 2015.

² Frédéric Jenny, 'Substantive convergence in merger control: An assessment' (2015) 1 *Concurrences* 21, 31-33.

relevant market. Given the emphasis that is now afforded to competition criteria, the influence of wider public interest considerations has become increasingly marginalised.³ However, despite this marginalisation, most domestic merger regimes continue to reserve a role for the public interest, albeit to a very limited degree in most cases.⁴ This raises a number of interesting questions regarding the wider role of the public interest in domestic states and the feasibility of further convergence internationally.

So how can domestic states seek to accommodate public interest criteria in an environment that is now largely driven by competition ideologies? In practice, states face a number of decisions regarding the framework of their substantive merger law and their institutional arrangement. In terms of substantive law, countries must decide how much influence to afford to the public interest during the assessment proceedings. For example, should public interest criteria be afforded extensive influence by considering it as part of the substantive test for assessment? Should it be considered in only limited circumstances as an exception to the test? Or perhaps it should be assessed as part of a sector-specific policy that runs parallel to merger control. With regards to institutional arrangement, countries face a potential dilemma when identifying who should decide on mergers affecting the public interest. Should this decision-making role be assigned to NCAs, politicians, sector regulators or a combination of these? The decisions a state makes in relation to these substantive and institutional issues can significantly dictate the level of influence afforded to the public interest in its domestic merger assessments. By considering the choices that states have made in practice, this chapter identifies the prevailing methods of accommodating the public interest and asks whether this supports the suggestion that the public interest now exists only on the periphery of international merger control.

³ ICN Advocacy Working Group, ‘Competition Culture Project Report’ (14th ICN Annual Conference, Sydney, April 2015) 10.

⁴ See Section 5.3.3, below. Of the countries observed in this chapter, 62.7% directly afford scope to the consideration of public interest criteria in their merger control legislation.

It is also worth considering whether socio-economic factors have had an influence on the way in which states have chosen to accommodate the public interest in practice. Do domestic variables – such as economic development – have a significant bearing on the importance a state attributes to the public interest and, in turn, how it chooses to accommodate it? As has been noted in earlier parts of this thesis, what is considered to be “in the public interest” is subject to change over time. Equally, different states will have their own interpretations of how the public interest should be defined and the role it should play in merger control. By considering the influence of socio-economic variables, the chapter seeks to establish why there has not been universal harmonisation between states with regard to approaching merger control and the public interest.

In seeking to address these research questions, the chapter proceeds as follows. Section 5.2 examines the different approaches that states can use to accommodate the public interest under domestic merger control. It shows that states will typically: (a) adopt one (or a combination) of four core options for framing public interest criteria within legislation, and (b) appoint one (or a combination) of three types of public interest decision-maker. Section 5.3 seeks to identify how states have accommodated the public interest in practice by conducting an empirical study of 75 domestic merger regimes. It finds that most states will: (i) either treat the public interest as an ‘exception’ to a competition-based test or frame it within parallel sector-specific policy, and (ii) assign decision-making powers to either a national competition authority or a politician. Section 5.4 extends the empirical analysis to analyse the potential influence that key socio-economic factors can have on how a state chooses to accommodate the public interest. The analysis suggests that factors traditionally thought of as influential (such as geographic locality, economic development and the type of legal regime in place) have only a negligible influence on the chosen method of accommodation. In contrast, the effectiveness of governance within a state appears to have a notable influence on how states choose to frame public interest criteria within legislation. Section 5.5 offers concluding remarks.

5.2. APPROACHES TO ACCOMMODATING THE PUBLIC INTEREST

5.2.1. The decisions facing countries when accommodating the public interest

There are numerous approaches a state can take when seeking to accommodate public interest considerations within their merger control regimes. States will usually adopt formal statutory provisions which specify how public interest criteria is to be accommodated and who will be assigned the relevant decision-making powers. In addition, states may also seek to give effect to the public interest via less formal means that are not specified in legislation.⁵ Given that these informal methods are not readily observable for the purposes of empirical analysis, this chapter is primarily concerned with the formal means by which states have sought to accommodate the public interest. As such, this section focusses on the formal decisions countries must take with regards to (i) framing public interest criteria in their domestic legislation (“legislative framing options”), and (ii) appointing a ‘public interest decision-maker’.

5.2.2. Options for framing public interest criteria in domestic legislation

When seeking to accommodate public interest criteria in merger law, the national legislature must be mindful of a number of intricate drafting details regarding how the public interest should be defined and when it should be considered. It is difficult to compare the different types of public interest criteria that states adopt, not least due to the boundless definitions that countries can attribute to these interests. Having said this, there are only a limited number of options available to states when it comes to deciding *when* the public interest should be invoked in merger assessments. Depending on how the public interest criteria is ‘framed’ in the merger legislation, public interest considerations may play a prominent role in every merger assessment, a restricted role in some pre-determined assessments, or no role at all. A preliminary

⁵ Consider, for example, the negotiations that took place between the South African government and Wal-mart in *Wal-mart/Massmart* (see Chapter 6) and the UK Government and Pfizer in *Pfizer/AstraZeneca* (see Chapter 4). In both cases, there was no statutory requirement for the negotiations to take place but both governments sought commitments from the bidding parties in an effort to alleviate public interest concerns.

examination of the 75 states considered in this chapter reveals that there are four main options for framing the public interest within merger control legislation:

Option 1 – Afford no scope to considering public interest criteria.

Although not strictly to be classed as an option for ‘accommodating’ the public interest – in fact, quite the opposite is true – this approach still represents an instance where the state has made a conscious choice regarding the role of public interest criteria.⁶ Under this approach, the state adheres strictly to competition-based criteria and affords no scope for considering wider public interest factors at any stage in the merger assessment process.

Option 2 – Consider public interest criteria as part of the substantive test.

Under this option, the public interest is considered directly alongside competition-based criteria in every merger assessment. This will sometimes involve ‘balancing’ the public interest criteria against competition findings to determine whether or not a merger should be allowed to proceed. Alternatively, the substantive test may be split into two phases: where the merger is assessed against competition-based criteria in the first phase, and against public interest criteria in the second phase. If the merger is deemed to satisfy both sets of criteria, the merger will be permitted. If the merger raises concerns with regard to one set of criteria, the merger will be blocked or remedies will be sought to address the concerns.

Option 3 – Reserve public interest ‘exceptions’ to the substantive test.

Here, the decision-maker will apply competition-based criteria during the merger assessment process but may, in exceptional circumstances, apply public interest criteria if the merger is suspected to raise public interest concerns. These exceptional circumstances may arise in mergers that have a direct impact on specific interests such as national security, media plurality or financial stability.

⁶ For the purposes of this empirical assessment, Option 1 is to be treated as a decision – on the part of the state – to ‘not accommodate the public interest’ within its domestic merger legislation.

Alternatively, the public interest exception can be defined broadly to include any merger that impacts upon the ‘national interest’.

Option 4 – Enforce sector-specific policies that run parallel to merger control.

As with Option 1, this approach does not allow for public interest criteria to be considered within the merger control assessment itself, but there is a key difference. Even after the transaction has been assessed on competition grounds in accordance with the merger control procedure, the outcome of the transaction may still be subject to a sector-specific policy, prompting a parallel sectoral assessment. This parallel assessment can then afford consideration to a number of sector-specific public interest issues. The sector-specific assessment has the potential to usurp the findings of the merger control assessment and thereby block, permit or seek remedies to address public interest concerns.

Although a state’s merger legislation will tend to resemble one of the four options described above, it is also possible for a state to adopt a mixed-options approach which combines two of these options. In this respect, states are limited in the types of combination they can pursue,⁷ but two combinations are possible:

A combination of Options 2 and 4 – Consider the public interest as part of the substantive test and, in addition, enforce sector-specific policies.

This first mixed-options approach involves assessing the merger on both competition and public interest grounds (Option 2), while simultaneously assessing whether the merger is compatible with sector-specific policy (Option 4). Although there may be some overlap between the public interest criteria considered in each parallel assessment, there is an observable difference between the two. Generally speaking, the public interest criteria considered under Option 2 will relate to issues that are capable of applying to all sectors (eg promoting a

⁷ For example, Option 1 (which avoids considering public interest criteria) will not be compatible with any of the other options. Equally, Option 2 (which considers the public interest within the substantive test for assessment) will not be procedurally compatible with Option 3 (where the public interest is treated as an ‘exception’ to the substantive test).

domestic firm's competitiveness internationally). In contrast, the public interest criteria considered under Option 4 will be sector-specific (eg ensuring the continuation of regional water supply in a merger between two water companies). As such, an approach that combines Options 2 and 4 has the potential to give effect to a wide range of possible public interest considerations.

A combination of Options 3 and 4 – Reserve public interest 'exceptions' to the substantive test and, in addition, enforce sector-specific policies.

As with the abovementioned combination of Options 2 and 4, this approach is capable of allowing public interest criteria to be considered at two stages of the assessment process. However, although Option 4 guarantees that public interest criteria will be considered in the parallel assessment, Option 3 only allows for such criteria to be considered in 'exceptional' circumstances. As such, any state that adopts this mixed-options approach will only exceptionally consider the public interest in both the merger and sector-specific assessments. It is also worth noting that, in contrast to Option 2, it is not uncommon for the types of public interest criteria considered under Option 3 to be sector-specific (eg maintaining a sufficient plurality of the media). This means that there can be an overlap between the markets-based public interest objectives considered under Option 3 and the sector-specific policies considered under Option 4. The range of potential public interest criteria is therefore unlikely to be as vast as that witnessed under the combined Options 2 and 4 approach. That said, certain broader public interest exceptions (eg 'national interest' or 'domestic economic interest') can allow a wider range of interests to be considered.

Accordingly, it is clear that a state must choose between six possible options when framing the public interest in legislation (inc. four core options and a further two mixed-options). For the purpose of the empirical analysis that follows, it is important to consider the potential influence that each option affords to the public interest in merger assessments. This is not altogether straightforward. The means by which public interest criteria is framed in legislation cannot, in itself, offer a definitive

indication of how influential public interest considerations will be in practice in any given country. For example, let us assume that the merger laws in Country A and Country B each frame the public interest as an ‘exception’ to the substantive test (Option 3). Country A specifies a single public interest exception whereas Country B lists four exceptions. One interpretation that could be taken from this is that the influence of the public interest in Country A is only one-quarter of the influence observed in Country B. But what if Country A enforces a broad public interest exception (eg ‘national interest’) and Country B adopts four narrowly-drafted exceptions (eg ‘media plurality’, ‘financial stability’, ‘energy security’ and ‘protection of R&D in the domestic science base’)? If this is the case, more mergers may fall under the single broad exception in Country A than under all four narrow exceptions in Country B. Consequently, the relationship between legislative framing options and the influence of the public interest should not be taken at face value.

However, this is not to say that legislative framing does not offer any insights into the influence of public interest criteria in practice. Clearly, some of the six options for framing public interest criteria have the potential to afford more influence to the public interest than others. Imagine a scale from 0-100, where ‘0’ represents a merger regime that affords no influence to the public interest, and ‘100’ is a merger regime that treats the public interest as fundamental in every case. At the lower end of the scale, Option 1 (*No public interest*) would feature at point ‘0’, given that it affords zero scope to the consideration of public interest criteria. Option 4 (*Sector-specific policy*) is the next to appear on the scale as it enables the public interest to be considered in limited circumstances involving mergers in certain sectors. This is followed by Option 3 (*Public interest exception*) which can give effect to both broad and narrowly-defined public interest considerations in all sectors. Next to feature is a combination of Options 3 & 4 (*Public interest exception and Sector-specific policy*), which essentially combines the potential influence that each of these standalone options affords to the public interest. Option 2 (*Public interest as part of the substantive test*) would be ranked towards the upper end of the scale, as it allows the public interest to be considered in every merger evaluation. Finally, a combination of Options 2 & 4

(*Public interest as part of the substantive test and Sector-specific policy*) will rank at the top of the scale on account of the fact that it not only enables the public interest to be considered in every merger evaluation, but it also requires some mergers to be subjected to further sector-specific public interest assessments. These rankings are illustrated in *Figure 2*, below.

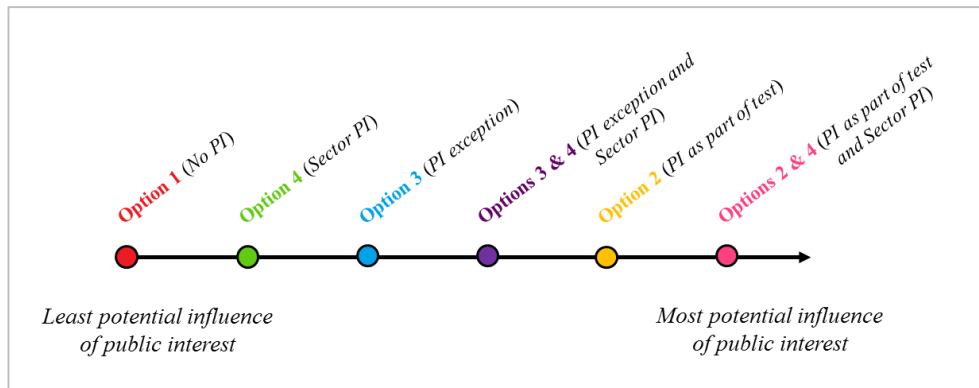


Figure 2. Ordinal scale ranking the legislative framing options according to the potential degree of influence they afford to the public interest in merger assessments.

Ranking the legislative framing options in this way lays the foundations for the empirical analysis that follows in Sections 5.3 and 5.4 of this chapter.⁸ By using each option as a proxy for the degree of influence afforded to the public interest in any given state, it is possible to draw preliminary conclusions on the role of the public interest in modern-day merger control (Section 5.3) and, moreover, the effect that socio-economic factors have had on this role (Section 5.4).

5.2.3. Options for appointing a ‘public interest decision-maker’

The second fundamental choice that states must make when seeking to accommodate the public interest is to appoint a decision-maker to rule on mergers that raise public interest concerns. In a similar vein to the legislative framing options discussed above,

⁸ The ordinal scale in *Figure 2* has its limitations; namely, that it is not possible to specify the exact size of the interval between any two categories. For example, in terms of the potential influence each option affords to the public interest, the interval between Option 1 and Option 4 may be larger than the interval between Option 4 and Option 3. Nevertheless, these ordinal measurements can still be relied upon to draw tangible statistical insights, see Sections 5.3 and 5.4 below.

states will need to consider certain intricacies before appointing a public interest decision-maker. For example, if there is a main body that oversees merger control in a given state, should this body also decide on mergers affecting the public interest or should the role be assigned to a separate body? States must also consider the expertise, resources and overall competence of a body before it is assigned the decision-making role. Among the 75 states considered in this chapter, there have been three main types of public interest decision-maker appointed:

National competition authorities

By their very definition, national competition authorities (NCAs) tend to operate under a consumer mandate by seeking to maintain and promote competition in markets. Some states, however, have chosen to extend the mandate of NCAs to consider the welfare of the public at large. NCAs will typically seek to employ individuals with expertise in competition law and economics, although the resources available to NCAs can vary considerably between states.⁹ The political independence of NCAs also varies drastically. Some have overt political links, either operating as part of a government department or being overseen by a government minister. Other NCAs may appear independent but governments may retain certain powers to eg appoint and discharge the CEO or to overturn the decisions of the NCA. Of course, there are also truly independent NCAs that operate at arm's length from government and are not subjected to political pressure in the decision-making process.

Politicians

For the purposes of this chapter, the term 'politician' is taken to include a collective group of politicians (ie a government or a ministerial cabinet), as well as an individual politician (eg a minister). These are, in the most part, elected officials belonging to a particular political party who have a broad mandate to

⁹ Khelma P. Armoogum and Bruce Lyons, 'What Determines the Reputation of a Competition Agency?' (12th Annual International Industrial Organization Conference, Chicago, April 2014) <https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIOC2014&paper_id=470> accessed 14 May 2014.

serve the economic and social interests of the state. In the context of public interest mergers, politicians may request advice from NCAs and regulators when seeking to establish the effect that a merger is likely to have on competition and specific public interest issues. Depending on the level of political stability in a given country, the politician(s) appointed to make decisions may change at regular intervals, usually after a cabinet reshuffle or where a new government has been elected.

Sector Regulators

The role of sector regulators is generally to monitor and administer policy in specific industries that exhibit unique characteristics and, as such, warrant closer regulatory scrutiny. Regulators can operate under various mandates (eg citizen and consumer mandates) and will sometimes have dual mandates which require them to consider the effects a merger is likely to have on two sets of stakeholders. On account of these wide-ranging mandates, regulators may also be required to consider the levels of competition in the relevant sector and, as such, may also work closely with NCAs. Employees will typically have sector-specific expertise and, in some cases, past experience of working in the industry. In much the same way as NCAs, the political independence of sector regulators varies state-by-state and sector-by-sector.

It is also possible for states to assign the public interest decision-making role to more than one of the abovementioned institutions:

Dual decision-makers

In theory, a state could prescribe a joint decision-making role involving all three institutions: an NCA, a politician and a sector regulator. In practice, however, no state out of the 75 considered in this chapter has opted for this triple decision-maker arrangement. That said, some states have appointed dual decision-makers in the form of either: (i) an NCA and a Politician, (ii) an NCA and a Regulator, or (iii) a Politician and a Regulator. It is difficult to summarise how these dual

decision-making roles operate in practice, as the relationship between the two decision-makers can take a number of forms. For example, it might be that each institution has equal power in the decision-making process and, as such, both institutions must approve the merger before it is allowed to proceed. Alternatively, in the event of each institution reaching a different conclusion on the effect of the merger on the public interest, one of the institutions may be given the ‘final say’ on whether or not the merger is allowed to proceed.¹⁰ Furthermore, in contrast to two decision-makers working together to reach a conclusion, states may merely appoint two decision-makers to ‘share the workload’, with each institution tasked with assessing mergers in specified industries.¹¹ Given that the dual decision-making approach can take many forms (both with regards to the identity of the decision-makers and the relationship between them), performing an analysis of it poses numerous practical challenges. Therefore, so as not to unnecessarily complicate the empirical analysis, Sections 5.3 and 5.4 of this chapter group the different types of dual decision-makers into a single category.

It is therefore clear that states can choose from among four possibilities for public interest decision-makers (including three standalone institutions and a dual decision-making approach).¹² The choice is made particularly interesting given that the state legislature (ie the government) is essentially faced with a choice between either: (i) assigning decision-maker powers to itself, or (ii) delegating power to a different institution to decide on mergers affecting the wider public interest. Have state governments shown a willingness to delegate these powers in practice? This is one of the questions explored in the next section.

¹⁰ Such a procedure has been proposed in the UK in the context of media mergers raising plurality concerns. For a discussion, see David Reader, ‘Does Ofcom Offer a Credible Solution to Bias in Media Public Interest Mergers in the United Kingdom?’ (2014) 4(1) CPI Antitrust Chronicle <<http://www.competitionpolicyinternational.com/does-ofcom-offer-a-credible-solution-to-bias-in-media-public-interest-mergers-in-the-united-kingdom>> accessed 14 April 2014.

¹¹ This is the case in the United States where the Department of Justice and the Federal Trade Commission are assigned competence over mergers in certain specified industries.

¹² Note that courts do not feature within the list of public interest decision-makers. Of the 75 states in the sample, many assign a role to the courts for reviewing the rulings of the decision-maker, but no states has chosen to appoint a court as a public interest decision-maker in its own right.

In the same way as the legislative framing options, we can again consider the potential influence that each decision-maker option affords to the public interest. Unfortunately, whereas there are general rules of thumb that allow the legislative framing options to be ranked according to their potential influence,¹³ the same cannot be said of decision-makers. Many factors can affect how frequently a decision-maker will give effect to the public interest. The most obvious is the merger legislation itself, which frames the public interest and specifies the powers of the decision-maker. However, we should also be mindful of the extra-legal factors that can influence decision-makers, such as their political independence and whether they are particularly prone to lobbying. These are not clear-cut categories that decision-makers can be grouped into, they are issues faced by every decision-maker regardless of their identity. If we were to rank the different types of decision-maker, it would require making a number of broad assumptions about the institutional make-up of NCAs, politicians and sector regulators in different states. To do so would be to oversimplify the research and, owing to this, the chapter refrains from relying on decision-makers as a proxy for the influence afforded to the public interest. Rather, the analysis of decision-makers is conducted to offer important insights into (i) the extent to which governments have been willing to delegate decision-making powers to other bodies, and (ii) whether a certain type body is considered more appropriate for assessing the public interest. This can be achieved without having to rank the decision-makers.¹⁴

¹³ The rule of thumb is that, broadly speaking, we can identify whether public interest criteria will be considered in (i) every case, (ii) some cases, or (iii) no cases, depending on how the criteria are framed in legislation.

¹⁴ In Carletti et al, the authors rank the different decision-makers by assigning an ‘effectiveness’ score between 0-1 to each body. This does not, however, overcome the need to make broad assumptions for an entire class of decision-maker. Elena Carletti, Philipp Hartmann and Steven Ongena, ‘The economic impact of merger control legislation’ (2015) 42 *International Review of Law and Economics* 88, 92.

5.3. HOW HAVE STATES ACCOMMODATED THE PUBLIC INTEREST IN PRACTICE?

Section 5.2 has identified two fundamental choices that a state must make when seeking to accommodate the public interest in its domestic merger regimes. The first concerns how the state wishes to frame the public interest in merger legislation, where there are six possible options to choose from. The second involves appointing a decision-maker to rule on mergers that raise public interest concerns, of which there are four main decision-makers a state can recruit. Having identified the options available to states, the next stage is to observe how frequently these options have been adopted in practice. This section seeks to make these observations by adopting an empirical methodology which considers the merger regimes of 75 domestic states. The section proceeds by firstly providing an explanation of the empirical methodology, before presenting a description of the domestic data set and, finally, revealing the findings of the empirical analysis.

5.3.1. Research Methods

5.3.1.1. Justifying the empirical approach

In previous chapters, this thesis has applied a legal doctrinal methodology to assess the role of the public interest in both the European Union and the United Kingdom. When undertaking research into a single jurisdiction, a doctrinal approach offers notable benefits in terms of conducting in-depth analysis that identifies the historical, social and economic contexts that shape the way a merger regime operates in practice. For the same reasons, doctrinal analysis can form the basis of a thorough comparative analysis between two-or-more jurisdictions. However, the doctrinal approach has its limitations in studies that seek to identify global norms among a large sample of states. The task of conducting an in-depth doctrinal analysis of 75 individual states is particularly onerous and, given the amount of information this would unearth, there is

a risk that this approach would overlook the ‘bigger picture’ and fail to identify the key trends that emerge at an international level.

By utilising an empirical methodology, the analysis in this chapter is able to draw insights that a traditional doctrinal approach would otherwise fail to deliver. This is achieved by identifying key features within each state in the sample, and thereby grouping the states according to the methods of accommodation outlined above. By segregating the data in this way, one can more readily observe the global norms by which states have accommodated the public interest in practice. In addition, the empirical approach has the effect of assigning quantitative values to qualitative data, meaning the data is more directly comparable with some of the quantitative data utilised in the study of socio-economic variables in Section 5.4.

Despite the notable benefits associated with empirical methodologies, it is worth noting the potential limitations of this approach. The main concern regards overlooking the important domestic variables that an empirical analysis of domestic legislation is unable to take account of. Legal academics have warned of the pitfalls of placing too much emphasis on legislation without consulting other important sources, such as case law, policy statements, news reports and academic commentary.¹⁵ Indeed, although merger legislation can offer a useful proxy for the influence afforded to public interest criteria domestically, it might not offer an accurate representation of the circumstances where the public interest is considered in practice. For example, merger legislation cannot generally reveal whether decision-makers will attach a wide or narrow interpretation to the public interest criteria.¹⁶ Nor will legislation reflect any guidelines or interim policy changes that have taken place in lieu of statutory reform.¹⁷ The author acknowledges these limitations and, in

¹⁵ Maher M Dabbah, *International and Comparative Competition Law* (CUP 2010) 38.

¹⁶ For instance, ‘national security’ is a public interest criteria that is referenced in several regimes and attributed very different meanings.

¹⁷ Consider, for example, the discussion in Chapter 4 regarding the introduction of the Tebbit Doctrine in the UK. Although it had no impact on the wording of the merger provisions under the Fair Trading Act 1973, a policy speech by Norman Tebbit MP prompted the UK authorities to depart from a public interest test in favour of a competition-based approach to merger control. *HC Deb 5 July 1984, vol 63, cols 213-14W*.

Chapter 7, proposes a future research project that would seek to reinforce the empirical analysis in this chapter with additional domestic case studies.

5.3.1.2. Methodology

Having decided to adopt an empirical approach, the next stage is to devise a methodology that makes effective use of empirical methods. A detailed explanation of the methodology used in this chapter can be found in Appendix 1 but, broadly speaking, the methodology consists of four steps.

Firstly, as Section 5.2 has highlighted above, it has been necessary to identify the various methods by which states can accommodate the public interest in practice. This has been accomplished by conducting an initial doctrinal study of 20 states, to reveal the six options for framing the public interest in legislation and the four options for appointing a public interest decision-maker.¹⁸

Secondly, a data set has been compiled to consolidate the information relating to merger control in each state. Further information relating to socio-economic variables has also been incorporated into the data set in order to lay the foundations for the analysis that follows in Section 5.4. A detailed account of how the data has been collected and codified can be found in Section 5.3.2, below.

Thirdly, having compiled the data set, the states are then grouped according to how each has chosen to accommodate the public interest in practice. This involves interpreting the data entries of each state and recording which of the six framing options they have chosen to adopt and which of the four decision-makers they have appointed.¹⁹

¹⁸ For details on the sources of data for this initial doctrinal study, see Section 5.3.2.1 for an overview of the data set.

¹⁹ Tables that group the states according to their choice of legislative framing options and decision-makers can be found in Appendices 2B and 2C respectively.

The fourth and final step involves subjecting the grouped data to empirical analyses. A number of analyses are conducted throughout this chapter. Section 5.3.3 undertakes a basic assessment of the frequency distribution of states adopting each legislative framing option and each decision-maker option. Section 5.4.3 examines whether socio-economic variables have influenced the way states have chosen to accommodate the public interest by making use of a range of statistical techniques (such as choropleth mapping and inferential tests, such as *t*-tests and ANOVA)²⁰ to interpret the data. With regards to the legislative framing options, the empirical analysis uses the ranking system illustrated in *Figure 2*, above, to identify whether there is a relationship between socio-economic variables and the level of influence states afford to public interest criteria in domestic merger legislation.²¹

5.3.2. Data on domestic merger control

5.3.2.1. Overview of the domestic data set

The consolidated data set, which can be found in Appendix 9, is comprised of information relating to the merger-specific, socio-economic and foreign investment variables of 75 domestic states. The merger-specific variables record various qualitative data, including: (i) the substantive test for merger assessment that the state has adopted, (ii) whether there is direct scope to consider public interest criteria in the merger regime,²² (iii) whether the public interest is framed as part of the substantive test (Option 2); (iv) whether the public interest is framed as an exception to the substantive test (Option 3); (v) whether sector-specific policy gives effect to public interest criteria (Option 4); (vi) the identity of the public interest decision-maker; and

²⁰ These techniques are used respectively in Section 5.4.3.1 (Geographic locality) and Sections 5.4.3.4 and 5.4.3.5 (Effectiveness of domestic governance and Openness to foreign investment).

²¹ An interesting alternative to ranking the options would be to calculate a score for each state, based on the degree of influence it affords to the public interest. See Chapter 7 for an account of how this technique could be used as part of future research. As noted above, a similar approach has been used to measure the ‘effectiveness’ of merger regimes and the impact this has on the stock prices and profitability of targets in bank mergers; Carletti (n 14) 92.

²² Direct scope is afforded if the public interest is either part of the substantive test or an exception to the test.

(vii) whether the decision-maker is independent of government. The records for the socio-economic variables include: (i) whether the state in question is a developing economy;²³ (ii) the type of legal system the state has in place; and (iii) the effectiveness of governance in the country.²⁴ Finally, the records for the foreign investment variables consist of: (i) whether the state is an OECD member country;²⁵ and (ii) how ‘open’ the state is to foreign direct investment.²⁶

5.3.2.2. *Populating and codifying the domestic data set*

The data for the analysis in this section is predominantly derived from two main sources: (i) the country overviews that appear in the 2014 edition of the Global Competition Review (GCR) Merger Control Handbook,²⁷ and (ii) the country profiles available from the George Washington University (GWU) Worldwide Competition Database.²⁸

The GCR Handbook is a reputable reference document that is updated annually and aims to provide legal and business practitioners with overviews of merger control procedures in a number of jurisdictions across the globe.²⁹ The country overviews have been written by preeminent merger control practitioners and each overview has also received factual verification from some of the world’s leading competition

²³ Based on the development status attributed to the state by the IMF; International Monetary Fund, *World Economic Outlook: Uneven Growth – Short- and Long-Term Factors* (IMF 2015) 150-153 <<http://www.imf.org/external/pubs/ft/weo/2015/01/>> accessed 5 May 2015.

²⁴ According to the 2014 readings of the World Bank Governance Indicators; World Bank, ‘Worldwide Governance Indicators (WGI) project’ <<http://info.worldbank.org/governance/wgi/index.aspx#home>> accessed 23 March 2015.

²⁵ ie A recognised member of the Organisation for Economic Co-operation and Development.

²⁶ According to the 2014 ratings of the OECD FDI Index; OECD, ‘FDI Regulatory Restrictiveness Index’ (*OECD Investment*, June 2014) <www.oecd.org/investment/fdiindex.htm> accessed 8 January 2015.

²⁷ Global Competition Review, *Getting the Deal Through: Merger Control 2014* (Law Business Research 2013). Hereafter, ‘the GCR Handbook’.

²⁸ Competition Law Center, ‘Worldwide Competition Database’ (*GWU Competition Law Center*) <<http://www.gwclc.com/World-competition-database.html>> accessed 3 June 2014. Hereafter, ‘the GWU Database’.

²⁹ As an indication of its reputability, the GCR Handbook has been endorsed by both the International Bar Association and the American Bar Association.

authorities.³⁰ Each country overview also provides answers to 36 ‘key questions’ relating to various substantive and procedural aspects of the domestic merger regime.³¹

The GWU Database is an online research resource hosted on the website of the George Washington Competition Law Center. At the time of writing, the database is populated with short country profiles for 120 competition regimes worldwide. In a similar fashion to the GCR Handbook, the country profiles in the GWU Database pose 38 questions regarding, *inter alia*, the obligations, independence and governance of competition authorities in each state. Many of these questions require binary ‘Yes/No’ answers, but the country profiles also provide additional elaboration where appropriate. For the purposes of the analysis in this chapter, the GWU Database offers a reliable resource for cross-checking the information relating to decision-makers contained in the GCR Handbook, particularly with regards to their independence.³²

In total, 75 domestic merger regimes are included in the data set and there are three main reasons for selecting this sample size: (i) to reduce the risk of data distortions, (ii) to ensure the data is sufficiently representative of global merger control, and (iii) to ensure the data is readily accessible from a reliable source.

Firstly, on the point of avoiding potential data distortions, there are justifiable grounds for imposing certain criteria on the types of state that are to be included within the sample.³³ For example, as the purpose of the study is to identify trends in domestic merger control regimes, it follows that the states within the sample should be domestic

³⁰ GCR Handbook (n 27) iii.

³¹ The main questions the data collection considers are: (Q1) ‘What is the relevant legislation and who enforces it?’; (Q8) ‘Are there also rules on foreign investment, special sectors or other relevant approvals?’; (Q19) ‘What is the substantive test for clearance?’; and (Q22) ‘To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?’.

³² In terms of independence, the key questions posed in the country profiles are: ‘Does the executive have powers to decide on specific cases based on public interest?’ and ‘Does the executive retain decision-making powers over the Competition Authority?’.

³³ By imposing qualifying conditions on the sample, this facilitates control variables that can be maintained throughout the sample to reduce the risk of data distortions.

rather than supranational.³⁴ Moreover, the state must have enacted formal merger control laws that explicitly refer to assessment criteria.³⁵ By restricting the sample to states that possess these characteristics, it ensures that the states are sufficiently similar to facilitate a robust empirical analysis of the effect of socio-economic variables.³⁶ An important question to bear in mind here is whether the sample should include states that have not made efforts to accommodate the public interest domestically. The decision has been made to retain these states in the sample because they potentially offer valuable insights into the effect that socio-economic variables have on the decision of whether or not to accommodate public interest criteria in the first place.

Secondly, the data set must be sufficiently representative of global merger control in order for the empirical analysis to obtain valid insights on the international norms for accommodating the public interest. As such, the sample states are selected from a broad geographic spectrum, thereby ensuring that the sample is more indicative of a range of socio-economic variables, many of which are significantly influenced by a country's geographic location. The 75 states in the sample are selected from six continents,³⁷ and also consist of a relatively even split between developed and developing economies,³⁸ one of the key socio-economic variables that will be analysed in Section 5.4. It is anticipated that this will be sufficiently expansive to identify the international trends relating to the accommodation of the public interest in domestic merger control and to the influence of key socio-economic variables.

³⁴ The 'domestic state' requirement precludes the consideration of supranational merger regimes, such as the European Union and the Common Market for Eastern and Southern Africa (COMESA), which both feature in the GCR Handbook.

³⁵ Uruguay enforces a procedural-based merger regime that lacks a substantive test for assessment. As such, the role afforded to competition and public interest criteria is not clear. Uruguay is therefore precluded from the sample. Luxembourg also fails to qualify by virtue of its lack of substantive merger assessment.

³⁶ Comparative scholars have noted that a meaningful comparative analysis requires states to be sufficiently comparable in terms of certain shared characteristics; see A. Esin Öricü, 'Methodology of comparative law' in Jan M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2006) 442.

³⁷ These include representatives from Africa (8 states), Asia (12), Europe (37), North America (7), South America (6) and Oceania (5).

³⁸ Of the 75 states in the sample, 38 are developed and 37 are developing.

Thirdly, the sample size will also be influenced by the availability of reliable data on the merger regime of any given state. Information and literature on certain merger regimes is scarce, particularly in countries that have only recently adopted merger control. This problem is aggravated by language barriers and the various statutes, institutions and reforms that need to be taken account of. Therefore, it is logical to select the sample states from amongst the countries featured in the GCR Handbook or the GWU Database, two reliable points of reference for information on domestic merger control and institutions.

5.3.3. Observations on how states have accommodated the public interest in practice

Before considering the potential influence of socio-economic variables, the data can first be assessed to identify the most common means by which the 75 states have accommodated the public interest, in terms of legislative framing and decision-makers.

5.3.3.1. Framing the public interest in merger legislation

Let us first consider the most popular options for framing the public interest in merger legislation. In light of the general rhetoric in academic and practitioner circles which advocates that states should adopt a competition-based approach to merger assessment,³⁹ one would expect to see most states either framing the public interest in a restrictive way or affording it no scope whatsoever. Indeed, the data appears to support this proposition. *Table 2*, below, specifies the number of states adopting each legislative framing option, with the options ranked according to the potential influence they afford to the public interest, as detailed above.

³⁹ See, for example, the ICN Recommended Practices for Merger Analysis (n 1) 1, Comment 1.

Table 2. Frequency distribution of states adopting each option of framing the public interest in legislation.

Option 1 (No PI)	Option 4 (Sector PI)	Option 3 (PI Exception)	Opts 3 & 4 (PI Exceptions & Sector PI)	Option 2 (PI Test)	Opts 2 & 4 (PI Test & Sector PI)
9 (12.0%)	19 (25.3%)	19 (25.3%)	14 (18.7%)	9 (12.0%)	5 (6.7%)

[Source: Appendix 2B].

Within the sample, 81.3% of states either avoid considering the public interest (Option 1) or frame public interest restrictively – either in sector-specific policy (Option 4), as an exception to the substantive test (Option 3) or a combination of both (Options 3 & 4).⁴⁰ In contrast, the options that afford a greater degree of potential influence to the public interest (Option 2 and Options 2 & 4) are adopted by only 19.7% of states. The most popular options for framing the public interest are Option 3, Option 4 and, to a lesser extent, a combination of the two; 69.3% of states adopt one of these three options.⁴¹ This indicates that, while the vast majority of states have chosen to afford scope to the public interest,⁴² there is a general preference for states to frame the public interest restrictively, meaning it will only be invoked in limited circumstances involving certain types of merger.

Moreover, the skewness of the data indicates a slight positive skew that tails towards the ‘least common’ options on the right-hand side of *Table 2*.⁴³ Again, this suggests that, as the degree of influence an option affords to the public interest increases, the probability of a state adopting that option decreases. These findings correspond to the

⁴⁰ 61 out of 75 states frame the public interest restrictively or afford no scope to it.

⁴¹ 52 out of 75 states adopt Option 3, Option 4 or a combination of both.

⁴² 47 out of 75 states (62.6%) afford direct scope to the public interest in their merger legislation, and 66 out of 75 states (88.0%) afford direct scope to the public interest in merger legislation or sector-specific policy.

⁴³ The degree of skewness within the distribution is calculated at 0.3430, indicating a noticeable – but not significant – positive skew; see Appendix 2A. The distribution also has a kurtosis of 2.44, indicating the curve of the data is relatively flat compared to a normal distribution; Appendix 2A.

initial proposition that international merger control has converged towards a predominantly competition-based approach.

Inference 1. *The vast majority of states continue to assign a restricted role to public interest criteria in their merger control regimes.*

5.3.3.2. Appointing a public interest decision-maker

The next step is to consider who states have appointed to the public interest decision-making role in practice. Predicting the most popular decision-maker is not altogether straightforward. On the one hand, given that the ICN Recommended Practices for Merger Analysis suggest that NCAs should decide mergers, albeit on competition grounds,⁴⁴ it may be that states have chosen to extend the decision-making responsibilities of NCAs to also include public interest assessments. In particular, if the domestic law requires the decision-maker to balance competition and public interest considerations, states may feel that NCAs are best-suited to this task by virtue of their competition expertise. On the other hand, states may prefer to assign the decision-making role to politicians because of (i) a constitutional belief that mergers affecting the public interest should be decided by a public representative, or (ii) a reluctance to cede decision-making powers on matters of public or strategic significance. *Table 3*, below, indicates that NCAs and politicians are, in fact, equally common among the states in the sample when it comes to appointing decision-makers.

Table 3. Frequency distribution of states appointing each public interest decision-maker.

NCA	Politician	Regulator	Dual	N/A [†]
21 (31.8%)	21 (31.8%)	9 (13.6%)	15 (22.7%)	9 (N/A)

[Source: Appendix 2C]. [†] Denotes states that do not consider the public interest and, as such, do not appoint a public interest decision-maker.

⁴⁴ ICN Recommended Practices (n 1) 1, Comment 3.

Of the 66 states in the sample that have appointed public interest decision-makers,⁴⁵ 31.8% have opted for NCAs, a further 31.8% have appointed politicians, 13.6% assign the role to regulators, and 22.7% implement a dual decision-making procedure. Given that less than one-third of states have appointed politicians as decision-makers, this would appear to indicate that states have shown a strong willingness to cede public interest decision-making powers to other bodies. However, if we consider the political independence of the decision-makers in the sample, the influence of state governments may not be as restrained as *Table 3* implies. Only 37.9% of the decision-makers in the sample (25 out of 66 states) take their decisions independently of government.⁴⁶ Hence, despite the majority of states opting against appointing politicians as direct decision-makers, the assessment of public interest mergers remains largely politicised in most states.

Inference 2. *NCAs and politicians have proved the most popular choices to fulfil the public interest decision-making role. However, despite showing a readiness to delegate decision-making powers, state governments retain a notable influence over the decision-making process.*

5.3.3.3. The most popular combinations for accommodating the public interest

We have so far established that states demonstrate a preference for: (a) prescribing a restricted role to public interest criteria in their merger regimes (Options 3, 4 or both), and (b) appointing NCAs or politicians as public interest decision-makers. In an effort to identify the dynamics between the two sets of choices, the legislative framing and decision-making variables can be considered together to reveal the most popular combinations for accommodating the public interest.

⁴⁵ These are the 66 states who afford scope to the public interest during the assessment process.

⁴⁶ See Appendix 2D. The politically independent decision-makers in the sample include: 13/21 NCAs (61.9%), 0/21 Politicians (0.0%), 6/9 Regulators (66.7%), and 6/15 Dual decision-makers (40.0%).

Overall, there are 21 possible combinations for states to choose from.⁴⁷ This is a broad range of possibilities but, nevertheless, there are some specific combinations that we would expect to observe more frequently in practice. For example, when a state frames the public interest in terms of sector-specific policy,⁴⁸ it might be more inclined to delegate the decision-making role to a sector regulator, in order to benefit from the regulator’s industry expertise. Alternatively, if the public interest is framed as part of a substantive test that requires the public interest to be balanced with competition criteria,⁴⁹ the state may be more likely to appoint an NCA as decision-maker or, at least, implement a dual decision-making procedure that includes an NCA. *Figure 3*, below, illustrates the most popular accommodation combinations within the sample.

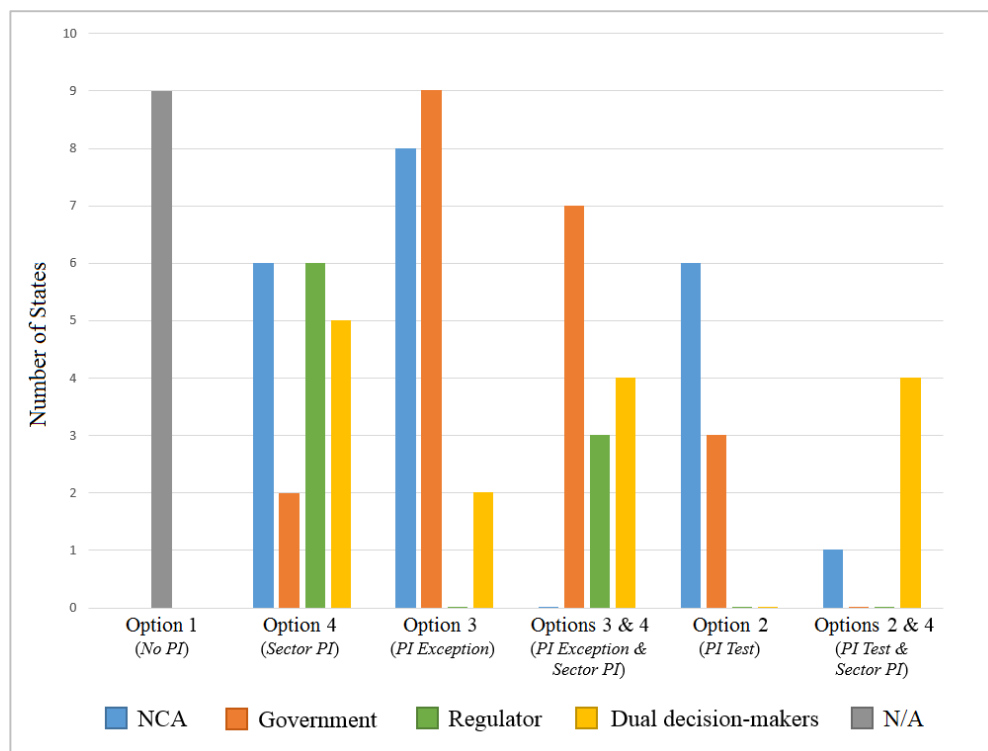


Figure 3. Distribution of different combinations of legislative framing and decision-maker options available to states. [Source: Appendix 2E].

⁴⁷ This figure includes the option of not affording scope to the public interest. For a table of the possible combinations, see Appendix 2E.

⁴⁸ ie Option 4, Options 2 & 4 or Options 3 & 4.

⁴⁹ ie Option 2 or Options 2 & 4.

A number of inferences can be drawn from the data. What is immediately observable is the wide variety of combinations that the states have adopted in practice. Of the 21 possible combinations available, 15 have been utilised by the 75 states in the sample. One explanation for this broad distribution is that, rather than simply transplanting the merger laws of another country, states have shown a willingness to tailor their approach in order to accommodate the public interest in a manner that suits their own domestic needs.⁵⁰ By a slight margin, the most common combination in the sample is to frame the public interest as an exception to the substantive test (Option 3) and to appoint a politician as decision-maker, an approach that has been adopted by 9 states.⁵¹ The second-most popular combination is also Option 3 but with an NCA appointed as decision-maker (8 states).

Given that the sample includes an equal number of NCAs and politicians as decision-makers, it is possible to directly compare the distributions of both. A notable difference between the two can be observed in instances where the public interest is framed as an exception (in Option 3 and Options 3 & 4). Although states adopting Option 3 have shown an eagerness to appoint both NCAs and politicians, not a single state that adopts a combination of Options 3 & 4 has chosen to appoint an NCA (compared with 7 states who have appointed a politician). In other words, where states have framed the public interest as an exception, the ratio of NCAs to politicians is 1:2.⁵² One way to interpret this is that, although many states believe that politicians should rule on the public interest, these states have been reluctant to over-politicise their merger regimes and, as a consequence, have restricted political decision-making powers to maintain the objective credibility of the review process. This is in contrast to what is observed under the legislative framing options that afford a greater degree of potential influence to the public interest. If we consider Option 2 and Options 2 & 4 as a whole, the ratio of NCAs to politicians is 2.33:1.⁵³ The inference here is that,

⁵⁰ Section 5.4 of this chapter will test this claim by considering socio-economic variables.

⁵¹ The United Kingdom is one of the states to adopt this combination, as explored in Chapter 4.

⁵² Of the states adopting Option 3 or Options 3 & 4, 8 have appointed NCAs and 16 have appointed politicians.

⁵³ Of the states adopting Option 2 or Options 2 & 4, 7 have appointed NCAs and 3 have appointed politicians.

whenever public interest criteria is considered in every merger assessment, states are more than twice as likely to delegate this responsibility to NCAs. However, although NCAs are more likely to play a role when the legislation affords significant influence to public interest criteria, this is not to conclude that NCAs themselves have more influence over the public interest. On the contrary, 6 of the states in the data set have appointed NCAs to oversee Option 4 (one of the lowest ranked options in terms of potential public interest influence). Therefore, considering the distribution as a whole, there is no significant difference between NCAs and politicians in terms of the influence they have been able to derive from their domestic legislation.⁵⁴

As anticipated, states have shown a greater willingness to assign the decision-making role to sector regulators when the public interest is framed in terms of sector-specific policy, either under Option 4 or under a combination of Options 3 & 4. Indeed, these are the only two groups in which states have assigned sole decision-making powers to regulators. This implies that states attach a great deal of importance to the sector-specific expertise of regulators, but have little desire for regulators to make decisions outside of their areas of expertise. Option 4 is also the most diverse group in terms of decision-makers, with all four types of decision-maker represented.

States have also been prepared to implement a dual decision-making role in a variety of circumstances. The only instance where dual decision-makers have not been adopted by at least one state is where the public interest has been framed as part of the substantive test for assessment (Option 2). This is somewhat unexpected given that the multi-disciplinary skillset of dual decision-makers (eg an NCA and a politician) would appear well-suited to the task of balancing competition and public interest criteria, a common feature of Option 2. However, dual decision-making is more prominent where legislation is framed under a combination of Options 2 & 4.⁵⁵

⁵⁴ Appendix 2F calculates an estimate for the mean level of influence that each decision-maker has derived from legislation. The mean averages of NCAs (3.429) and politicians (3.524) are very similar.

⁵⁵ Four states have prescribed a dual decision-making role here, and all of them involve NCAs: Greece and Poland (NCA and regulator), and Israel and Taiwan (NCA and politician).

Inference 3. *States have been prepared to adopt various combinations of legislative framing and decision-makers to suit their own needs. Where states have framed the public interest as an ‘exception’ to the substantive test, politicians have been the preferred choice in terms of decision-maker. When the public interest is framed to play a role in every merger assessment, most states place their trust in NCAs to make the final decision. Sector regulators are considered desirable when ruling on sector-specific public interest issues because of their industry expertise. But few states have taken advantage of the multi-disciplinary insights of dual decision-makers when it comes to balancing competition and public interest criteria.*

Having identified the most common methods for accommodating the public interest in practice, the logical progression of the chapter is to consider whether any socio-economic factors have influenced how states have chosen to make this accommodation.

5.4. WHAT IS THE INFLUENCE OF SOCIO-ECONOMIC VARIABLES?

The extent to which socio-economic factors influence a state’s adoption and enforcement of competition policy has become a prominent point of discussion for academics and policy makers alike. Comparative competition law researchers, in particular, have emphasised the importance of appreciating the potential influence of socio-economic variables when it comes to assessing why a country chooses to design its competition law and institutional framework in a certain way.⁵⁶ Fundamental design choices can be influenced by a country’s legal, political and economic culture,⁵⁷ and merger control, in particular, can be immensely reflective of a country’s

⁵⁶ See, for example, Dabbah who suggests that the mere fact that almost all competition regimes are derived from a particular political philosophy makes it extremely difficult to separate competition law from its socio-economic framework. Dabbah (n 15) 63.

⁵⁷ Eleanor M. Fox and Michael J. Trebilcock, ‘The GAL Competition Project: The Global Convergence of Process Norms’ in Eleanor M. Fox and Michael J. Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP 2013) 4.

legal traditions, historical context and its stage of economic development.⁵⁸ Moreover, as a competition regime begins to mature and its effectiveness becomes more observable, there is an increased likelihood that legislators will seek to adapt the law and, in doing so, take inspiration from the broader institutional arrangement of the state's legal system as a whole.⁵⁹

By virtue of these socio-economic discrepancies between states, it is widely accepted that the goal of a single universal formula for global competition law is, for the time being at least, incomprehensible.⁶⁰ However, as has been noted above, efforts have been made at an international level to facilitate substantive and procedural convergence between domestic merger regimes. If such convergence can be facilitated, it has the potential to 'neutralise' the influence of certain socio-economic factors by encouraging greater uniformity. In practice, harmonisation initiatives launched by competition convergence champions (namely, epistemic communities including the ICN,⁶¹ the OECD,⁶² and UNCTAD,⁶³ among others) have reached important milestones in their efforts to promote substantive convergence in merger control.⁶⁴ Nevertheless, Section 5.3.3 observes that, between them, the 75 states in the sample have adopted 15 different approaches to accommodating public interest criteria in practice. This is indicative of the notable inconsistencies that persist

⁵⁸ Larry Fullerton and Megan Alvarez, 'Convergence in International Merger Control' (2012) 26 *Antitrust ABA* 20, 21.

⁵⁹ Mariana Prado and Michael Trebilcock, 'Path Dependence, Development, and the Dynamics of Institutional Reform' (2009) 59 *University of Toronto Law Journal* 341, 354.

⁶⁰ Ratnakar Adhikari, 'What Type of Competition Policy and Law Should a Developing Country Have?' (2004) 5(1) *South Asia Economic Journal* 1, 2.

⁶¹ Namely the ICN Recommended Practices (n 1) and the ICN Merger Working Group.

⁶² OECD, 'Recommendation of the Council on Merger Review' (23 March 2005, C (2005) 34) <<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Lang=en&Book=False>> accessed 20 September 2015.

⁶³ The United Nations Conference on Trade and Development. UNCTAD's convergence materials are derived from its peer reviews of merger control in certain regions and jurisdictions; see eg UNCTAD, 'A Tripartite Report on the United Republic of Tanzania-Zambia-Zimbabwe: Comparative Assessment' (2012) UNCTAD/DITC/CLP/2012/1 <http://unctad.org/en/PublicationsLibrary/ditccplp2012d1_overview_en.pdf> accessed 20 September 2015.

⁶⁴ These initiatives have succeeded in facilitating tangible convergence on market definition and substantive standards of analysis; see Jenny (n 2). However, procedural divergences endure in relation to timeframes for assessment in some countries, which creates unnecessary costs for merging parties in international transactions; Jonathan Galloway, 'Convergence in International Merger Control' (2009) 5(2) *Competition Law Review* 179, 185.

between states at a substantive and institutional level when considering public interest criteria.⁶⁵ So what has been the main obstruction to convergence in this area of law? A number of socio-economic factors potentially hold the answer.

5.4.1. Identifying socio-economic variables

This section will analyse the potential influence that five socio-economic variables have on how a state chooses to accommodate public interest criteria in its merger regime. These variables include:

- (a) Geographic locality;
- (b) Economic development;
- (c) The type of legal system in place;
- (d) The effectiveness of domestic governance; and
- (e) Openness to foreign investment.

The decision to analyse these particular variables as part of the empirical assessment has been made for several reasons. The primary reason is that four of these variables – (a), (b), (c) and (d) – have either formed the basis of previous studies in competition law, or have been cited as potentially influential factors when states are seeking to design and implement competition policy.⁶⁶ Given their perceived significance in the literature, these variables offer a useful starting-point for the empirical assessment. In contrast, the fifth variable to be tested – (e) Openness to foreign investment – has been

⁶⁵ The Chairman of the OECD Competition Committee, Frédéric Jenny, suggests that substantive differences between merger regimes are primarily due to differing economic characteristics or the presence of public interest clauses. He suggests further convergence can be achieved by reducing the importance of public interest considerations; *ibid* 41.

⁶⁶ For examples of studies of these variables or references to their potential significance, see (a) Geographic locality, eg Mark RA Palim, ‘The worldwide growth of competition law: an empirical analysis’ (1998) 43 *Antitrust Bulletin* 105, and Brian A. Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (LexisNexis Canada 2013) 19; (b) Economic development, eg Adhikari (n 60) 2, and Moisés Naím, ‘Does Latin America Need Competition Policy to Compete?’ in Moisés Naím and Joseph S. Tulchin (eds), *Competition Policy, Deregulation, and Modernization in Latin America* (Lynne Rienner Publishers 1999) 31; (c) Type of legal system, eg Fox and Trebilcock (n 57) 5-6, and Dabbah (n 15) 15; and (d) Effectiveness of domestic governance, eg David J. Gerber, *Global Competition: Law, Markets and Globalization* (OUP 2009).

afforded relatively little mention in the competition law literature. It is, however, beginning to receive greater attention in practitioners' circles, owing to the interplay between merger control and foreign direct investment (FDI) review when overseeing cross-border mergers.⁶⁷ As it is possible for both merger control assessments and FDI reviews to consider public interest criteria, it is interesting to consider the relationship between the two and how they cohabit.

An important point to raise with regards to variable (e) concerns the dynamics of its relationship with merger control. If we consider variables (a) to (d), it appears that the relationship between these variables and the design of merger control is predominantly one-way; in other words, variables (a) to (d) have the capacity to influence – but not *be influenced by* – the design of merger control. For example, how a state chooses to design its merger control will not affect its geographic locality, nor is it remotely likely to prompt a change in its legal system or alter the effectiveness of its domestic governance (which includes factors such as political stability and rule of law). Variable (b) is a slight exception to this because, in the long-term, it is conceivable that the design of merger control will have a tangible impact on the economic development of a state. However, given the wide range of measures that are considered in the calculation of economic development,⁶⁸ and the relative infancy of merger control in developing states, we can legitimately assume that no domestic merger control regime has yet given rise to a developing country achieving developed status. For variable (e), on the other hand, there is every possibility that a two-way relationship exists between itself and the design of merger control. If a state adopts a macro-economic stance of being 'closed' to foreign investment, it is logical that the state's merger control will reflect this in some way (eg by embedding a public interest clause that seeks to protect 'the national interest' or strategic sectors). Equally, by

⁶⁷ The inspiration to consider openness to foreign investment as a variable comes from the author's attendance of the GCR Live conference on 'Foreign Investment Review – Getting the Deal Done in the Evolving Regulatory World' (London, 17 October 2013).

⁶⁸ The World Bank, International Monetary Fund and United Nations Development Programme all consider a broad range of economic, environmental and social factors in their development indices; Lyng Nielsen, 'Classifications of Countries Based on Their Level of Development: How it is Done and How it Could be Done' (2011) IMF Working Paper 11/31, 7-18
<<http://www.imf.org/external/pubs/cat/longres.aspx?sk=24628.0>> accessed 24 March 2015.

enforcing these protectionist clauses (and, as such, sheltering domestic firms from potential foreign purchasers), merger control can itself be said to influence the state's overall 'openness' to foreign investment. It is therefore important to bear in mind this two-way relationship when it comes to analysing whether openness to foreign investment has an influence over how a state chooses to accommodate the public interest in merger control.

One limitation to note, which indirectly stems from the adoption of an empirical methodology, is the absence of 'the goals of competition law' as a socio-economic variable in this study. Indeed, there exists a wealth of literature that speaks of the observable relationship between the goals that states attribute to competition law and the design of the competition laws that states ultimately adopt.⁶⁹ To analyse the influence that individual goals have had on how states accommodate the public interest would certainly produce some insightful findings. Unfortunately, there are practical limitations associated with such an analysis in an empirical study. In practice, domestic states have a long 'shopping list' of different goals to choose from.⁷⁰ The length of this list does not, in itself, pose a practical problem for the empirical analysis because the states in the sample can be grouped according to their chosen goal, in much the same way as this chapter has done for the legislative framing options and decision-makers. The practical limitation lies in the fact that states will define these goals differently, in terms of meaning and scope, and may also select more-than-one goal. As a consequence, to model the variable would require grouping the states according to standalone goals (of multiple definitions) and joint-goals (of multiple combinations). As the potential number of groups is high, there is a risk that the data set will become fragmented which, in turn, has the effect of reducing the robustness

⁶⁹ See, eg David A. Hyman and William E. Kovacic, 'Institutional Design, Agency Life Cycle, and the Goals of Competition Law' (2013) 81(5) *Fordham Law Review* 2163.

⁷⁰ This list includes, inter alia, protecting jobs, protecting small firms, promoting domestic industries and promoting a diverse spread of ownership. Eleanor Fox and Michal S Gal, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' in Michal S Gal and others, *Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar, Cheltenham (UK) 2015).

of the statistical analysis.⁷¹ For this reason, the analysis refrains from considering ‘the goals of competition law’ as a socio-economic variable.

5.4.2. Overview of data on socio-economic variables

Whereas in Section 5.3 the data pertaining to domestic merger control has been derived from two main sources (the GCR Handbook and the GWU Database), it has been necessary to consult a number of sources in order to populate the socio-economic data set.⁷² The relevant data sources for each variable are referred to separately under each of the empirical tests conducted in Section 5.4.3, below. Further details of the data collection process for the socio-economic variables can be found in Appendix 3.

By way of an overview, it is worth noting that some of the socio-economic variables in this section are modelled with discrete data,⁷³ whereas others make use of continuous data. The decision to use one or the other is, in the most part, a matter of necessity. For example, ‘Geographic locality’ and ‘Type of legal system’ are clearly discrete variables that cannot be measured numerically. In contrast, ‘Effectiveness of domestic governance’, ‘Economic development’ and ‘Openness to foreign investment’ can all be considered continuous variables, which can be assigned a numerical value to reflect the level of stability, development or openness in a state.⁷⁴ As an extension of this, it is also possible to model these continuous variables with discrete data by defining classes or thresholds. For example, if political stability (a component of domestic governance) is measured on a scale between -2.5 and 2.5,⁷⁵ a threshold could be imposed (for example, at point ‘0’) to distinguish between ‘politically stable states’ and ‘politically unstable states’. This ‘categorisation’ of

⁷¹ This is particularly true where a small or moderate sample size is involved (such as the 75 states considered in this study), meaning the average number of states in each group will be small.

⁷² The data relating to the socio-economic variables can be found in rows 9-14 of the consolidated data set in Appendix 9.

⁷³ ie Categorical data.

⁷⁴ A number of international bodies – including the World Bank, the IMF and the OECD – have developed indices for measuring these variables numerically; see Sections 5.4.3.2 – 5.4.3.5.

⁷⁵ This is the range adopted by the World Bank for expressing ‘political stability’ (a component of domestic governance) within its World Governance Indicators; see Section 5.4.3.4.

continuous variables is often seen in the expression of economic development, where continuous data is relied upon to categorise states as discrete variables; either ‘developed’ or ‘developing’.

Both continuous and categorical data have their advantages and disadvantages when undertaking empirical analyses. Continuous data provides greater detail on a variable and can be modelled using more robust statistical methods, but categorical data are less prone to the reliability issues often faced by continuous data that rely on estimates.⁷⁶ For the analysis in this section, continuous data is used to model the ‘Effectiveness of domestic governance’ and ‘Openness to foreign investment’ variables, whereas categorical data is used to test ‘Economic development’. Although continuous data is available on economic development via the World Bank,⁷⁷ the data takes the form of separate indicators – such as estimates for human development, environmental resources and industrial development – rather than a single aggregated indicator that specifies the overall level of development in a given country. In the absence of an aggregated indicator, the analysis relies on the development classifications of the International Monetary Fund (IMF), which groups countries into discrete categories of ‘developed’ and ‘developing’ economies.⁷⁸

5.4.3. Observations on the influence of socio-economic variables

5.4.3.1. Geographic locality

Turning first to consider the potential influence that geographic locality has on how a state chooses to accommodate the public interest, what patterns (if any) would we expect to observe? Here, the process of ‘knowledge exchange’ offers a possible indication. A common occurrence when a country adopts or adapts its competition

⁷⁶ Dawn Iacobucci, ‘Continuous and Discrete Variables’ (2001) 10(1) *Journal of Consumer Psychology* 37.

⁷⁷ World Bank, ‘World Development Indicators’ <<http://data.worldbank.org/data-catalog/world-development-indicators>> accessed 25 March 2015.

⁷⁸ International Monetary Fund (n 23).

laws is that it will draw on the experiences of other competition regimes, in an effort to optimise the effectiveness of its own practices. The United States and the European Union have ‘dominated’ knowledge transfer in terms of inspiring the competition laws of other states,⁷⁹ so we might expect that the states located in geographically close proximity to the US or EU will share similar characteristics. Given that the US, in particular, has historically demonstrated a high degree of competition advocacy,⁸⁰ it might be that countries in the Americas take a similarly strict competition-based approach to merger control and, as such, afford little scope to public interest criteria. Furthermore, neighbouring states may also seek to accommodate public interest criteria in similar ways in order to address public interest concerns experienced in a particular geographic region.

The geographic locality variable can be examined in several ways. For this section, choropleth mapping has been used to visualise the distribution of legislative framing options and decision-makers across the geographic spectrum. A limitation of conducting choropleth mapping across international states is that it is prone to exaggerating the significance of land mass, which one should be mindful of when interpreting the maps. However, this aside, choropleth mapping allows clusters of countries adopting similar framing options and decision-makers to be directly observed. The existence of these clusters would indicate that geographic locality is influential when accommodating the public interest in merger regimes in certain parts of the world.

Figure 4, below, shows a choropleth map illustrating the geographic distribution of each option for framing the public interest across the sample states. The lighter shaded regions represent states that adopt legislative framing options that afford little-or-no scope to the public interest, whereas darker regions indicate states that adopt options which afford a greater degree of consideration to public interest criteria.

⁷⁹ Dabbah (n 15) 3.

⁸⁰ Maurice E. Stucke, ‘Is competition always good?’ (2013) 1(1) *Journal of Antitrust Enforcement* 162, 162-165.

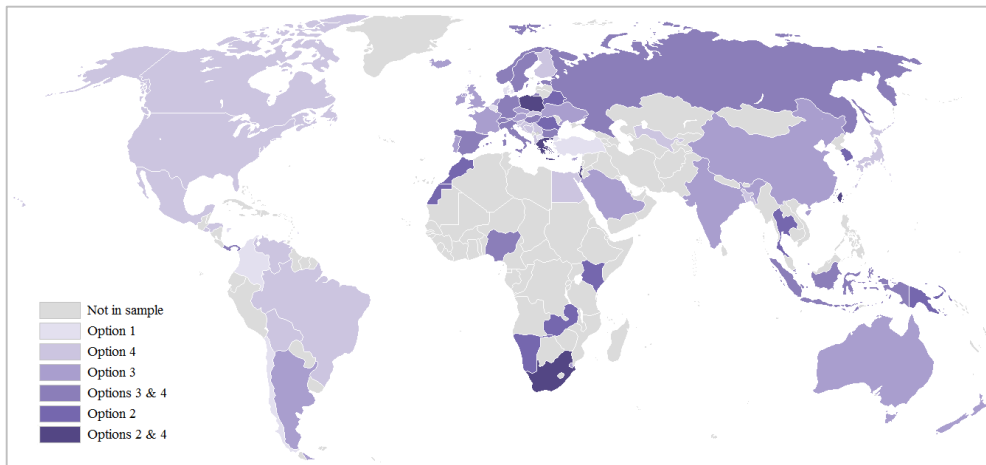


Figure 4. Choropleth map showing geographical distribution of legislative framing options across states [Source: Appendix 4A].

The value of *Figure 4* as a visual aid is somewhat limited by the moderate number of states in the sample but, nonetheless, several observations can be made. Firstly, public interest criteria appears to display a high degree of influence in the merger regimes concentrated around Africa, Southeast Asia and, to a lesser degree, Eastern Europe. Of the 8 African states in the sample, 5 of these states (62.5%) adopt either Option 2 or a combination of Options 2 & 4, which afford the greatest scope to the public interest.⁸¹ This is in contrast to the relatively small proportion of states that adopt the two most influential options in other regions: Asia (33.3%), Europe (10.8%), North America (0.0%), South America (0.0%), and Oceania (20.0%). A larger sample size would be necessary to substantiate these percentages but the preliminary indication is that legislative framing options which afford an extensive role to the public interest are much more likely to be adopted in African states, compared to other geographic regions. More generally, the choropleth gradient in *Figure 4* also suggests that states in the Eastern Hemisphere demonstrate a greater willingness to afford scope to the public interest, compared to their Western counterparts.

In terms of regions that exhibit less of a willingness to consider public interest criteria, all 6 of the South American states in the sample adopt either Option 1, Option 4 or

⁸¹ See Appendix 4A.

Option 3, which afford the least scope to the public interest. Additionally, 6 of the 7 North American states in the sample adopt one of these three options.⁸² Furthermore, not a single one of the North and South American states in the sample has adopted Option 2 or a combinations of Options 2 & 4, corroborating the idea that merger control in the Americas will tend to adhere more strictly to competition-based principles.

Inference 4. *African states are considerably more likely to assign an extensive role to the public interest in their merger control regimes. North and South American states typically frame public interest criteria more restrictively in their merger regimes. These observations indicate that the geographic region does have a bearing on how the public interest is framed in merger legislation, although they may also be explained by other socio-economic variables present in a particular geographic region.*

Further observations can also be made by referring to the geographic distribution of public interest decision-makers between states. The map in *Figure 5*, below, charts the decision-makers appointed by each of the sample states.

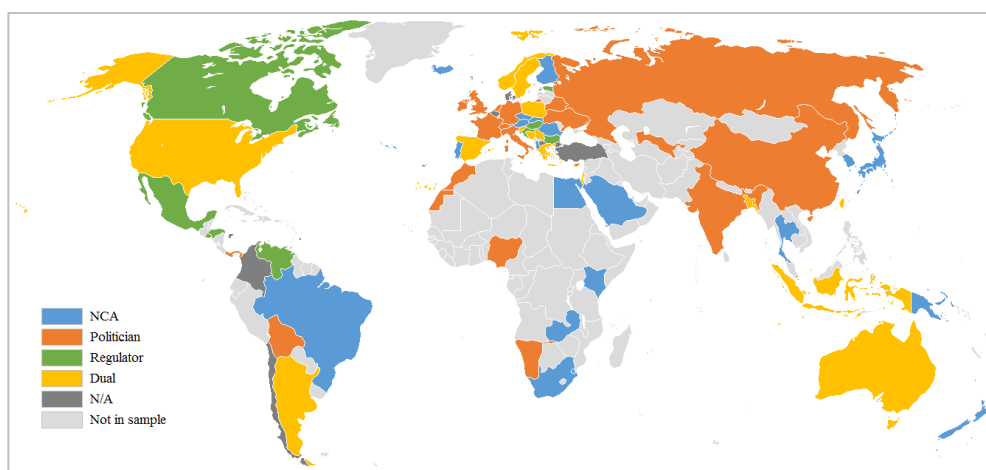


Figure 5. Choropleth map showing geographical distribution of public interest decision-makers. [Source: Appendix 4B].

⁸² The remaining North American state, Panama, adopts a combination of Options 3 & 4.

The map reveals that a geographically diverse range of appointments have been made in each region, with at least two types of decision-maker present in every continent. As has been noted in Section 5.3.3.2, NCAs and politicians are the most-favoured decision-makers within the sample and, if we consult the blue and orange-shaded regions in *Figure 5*, we can observe the geographical distribution of each. At first glance, one would be forgiven for thinking that political decision-making is concentrated in Eastern Europe and large parts of Asia, but this is somewhat misleading given the large land mass of China, India and Russia (who each appoint politicians as decision-makers). In reality, the proportion of NCAs and political decision-makers is fairly even on all continents.⁸³ Nevertheless, there are clusters of neighbouring states which share the same type of decision-maker, therefore implying the existence of regional influence. As aforementioned, both Europe and Asia see large clusters of neighbouring states appointing politicians. In the case of Europe, the cluster of states adopting political decision-makers might be explained by the fact that EU Member States are caught under the jurisdiction of EU merger control, which may have influenced the domestic merger regimes of Member States.⁸⁴ In contrast, states appointing NCAs are comparatively well-dispersed; the only region that resembles a ‘hot spot’ for NCAs is in central and southern Africa. Much of Oceania and even some Nordic territories have opted for dual decision-makers.

Inference 5. *Decision-makers are very widely distributed between continents, suggesting that geographic locality does not have a significant influence on the type of public interest decision-maker selected by a state. NCA and politicians, the two most common types of decision-maker in the sample, are also distributed relatively equally on each continent. A cluster of political decision-*

⁸³ This is more apparent from Appendix 4B.

⁸⁴ As has been discussed in Chapter 3, the governments of EU Member States can intervene to assume competence over EU-level merger assessments where it is considered necessary in order to protect a legitimate public interest concern, under Article 21(4) EUMR. The fact that governments perform this public interest function in relation to EU-level mergers may have also influenced the public interest decision-making role in relation to domestic mergers.

makers in Europe may be explained by the influence of EU merger control, whereas there is also a high concentration of NCA decision-makers in Africa.

Although there are certain inferences we can take from the influence of geographic locality as a socio-economic variable, it is important to consider why we observe similarities in particular regions. Although knowledge transfer, as noted above, provides a possible explanation for these similarities, another possible reason is that states in a particular region are facing similar socio-economic challenges and, as such, are forced to adopt similar laws and institutional designs in order to address these challenges. The analyses of the remaining socio-economic variables in this section should shed further light on why we observe these geographic patterns.

5.4.3.2. Economic development

Economic development is commonly cited as a key influencing factor when states decide how to design and implement competition law. This has, in the most part, been attributed to the different types of challenges faced by developed countries when compared with developing and emerging economies.⁸⁵ Although the development goals of every developing country are unique in form and scale, they very often seek to address public interest concerns, such as mass unemployment, poverty and social inequality. It has been well-documented in the literature that many developing countries have sought to give effect to these development goals by incorporating them within their competition laws.⁸⁶ Scholars have suggested that this may be an attempt by developing countries to make competition law and merger control ‘more friendly

⁸⁵ For example, whereas developed countries may adopt competition laws to promote welfare and efficiencies, many developing countries have implemented competition law for substantive and even symbolic purposes in pursuit of development goals; Spencer Weber Waller, ‘Comparative competition law as a form of empiricism’ (1998) 23 Brooklyn Journal of International Law 455, 456.

⁸⁶ South Africa has attracted particular attention from academics and practitioners for integrating development goals within its competition law; see Vani Chetty, ‘The Place of Public Interest in South Africa’s Competition Legislation: Some implications for international antitrust convergence’ (53rd Spring Meeting of the ABA Section of Antitrust Law, Johannesburg, April 2005) <<http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/spring/05/aba-paper.pdf>> accessed 22 September 2015.

to growth and development'.⁸⁷ This has prompted Frédéric Jenny, the Chairman of the OECD Competition Committee, to suggest that public interest criteria may be a 'necessary evil' in some developing countries, who would otherwise decide against adopting competition law if it meant they could not consider wider development goals.⁸⁸ Others have suggested that developing countries may also need to assign a prominent scope to the public interest in order to give NCAs (as public interest decision-makers) credibility in the eyes of the public.⁸⁹ In light of this literature, one might therefore expect to see that the developing countries in the sample adopt legislative framing options that afford a greater scope to the public interest.

For this analysis, the states in the sample have been grouped into 'developed' and 'developing' states, according to their IMF classification.⁹⁰ This produces a ratio within the sample of 38:37 with regards to developed and developing countries. Because the number of developed and developing states in the sample is almost identical, this avoids significant distortions when it comes to comparing the developed and developing states directly against one another.

Figure 6, below, shows the respective number of developed and developing countries adopting each legislative framing option.

⁸⁷ Jenny (n 2) 41.

⁸⁸ Henry Vane, 'Public interest clauses may be a necessary evil, says OECD head' (*Global Competition Review*, 13 March 2015) <<http://globalcompetitionreview.com/news/article/38187/public-interest-clauses-may-necessary-evil-says-oecd-head>> accessed 22 September 2015.

⁸⁹ Lewis suggests that, in developing countries, an NCA that is only able to decide mergers on competition grounds, even if the decision appears counterintuitive to development goals, will seriously struggle to achieve credibility and legitimacy; David Lewis, 'The Role of Public Interest in Merger Evaluation' (ICN Merger Working Group, Naples, 28-29 September 2002) 2.

⁹⁰ IMF (n 23).

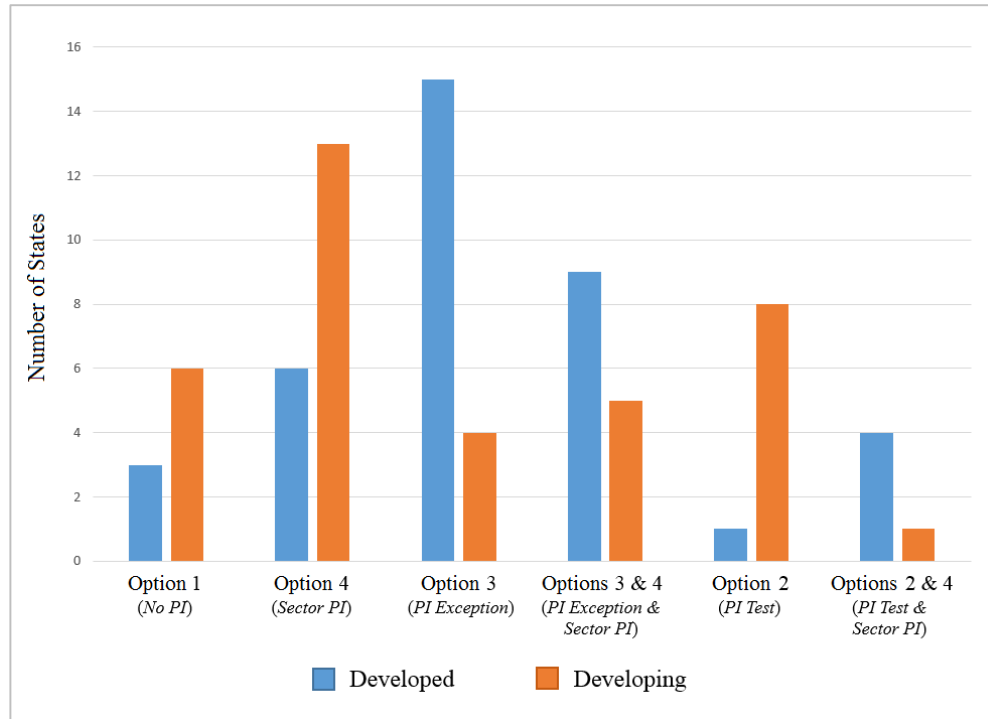


Figure 6. Distribution of legislative framing options adopted by developed and developing countries.

Once again, it is interesting to note that every legislative framing option has been adopted by at least one developed and one developing country. Indeed, we see that developed and developing countries fall into each extreme of the legislative framing options; both Option 1 (no public interest consideration) and Options 2 & 4 (public interest as part of the substantive test and sector-specific policy). This, in itself, is an early indication that economic development does not have a tangible impact on how a state accommodates the public interest.

Indeed, by performing a two-sample *t*-test to compare the respective means of each distribution, as Appendix 5 demonstrates, it transpires that there is no statistically significant difference between the types of legislative framing options that are typically adopted by developed and developing countries.⁹¹ However, even though the *t*-test suggests that economic development does not generally dictate the level of

⁹¹ In testing the null hypothesis that economic development has *no* significant influence on how a state frames the public interest, to a $p = 0.05$ level of significance, the *t*-test returns a *p*-value of 0.338. As this is statistically significant, we fail to reject the null hypothesis. See Appendix 5B.

influence a state affords to the public interest, *Figure 6* does reveal certain intricacies that a *t*-test overlooks. For example, a significant proportion of developed countries (39.5%) choose to frame the public interest as an exception to the substantive test (Option 3), which is considerably more than the proportion of developing countries who choose to take the same approach (10.8%). Conversely, 35.1% of developing countries accommodate the public interest in sector-specific policy (Option 4), compared to 15.8% of developed countries. This is perhaps due to the perceived need that developing states have to protect certain strategic sectors that aid their development goals.⁹²

Interestingly, whereas only 3 developed countries in the sample have decided against affording scope to public interest criteria (Option 1), 6 developing countries have decided to do this. This would seem to dispel the commonly held belief that developing countries take an altogether more liberal approach to the public interest. It also hints at the possibility that some developing countries are taking inspiration from the strict competition-based approach witnessed in the United States. However, if we consider the other end of the spectrum, developing countries are also more likely to adopt options that afford extensive scope to the public interest compared to developed countries. Taking Option 2 and Options 2 & 4 as a whole, 9 developing countries apply one of these options, compared with 5 developed countries. In reality then, we observe a disproportionate number of developing countries residing at both extremes on the legislative framing scale, which is in contrast to the common conceptions cited in the literature.

Inference 6. *Considering the sample as a whole, economic development does not have a significant impact on how much influence states choose to afford to the public interest when framing merger law. However, in practice, developed states have typically shown a preference towards public interest exceptions (which appear in the*

⁹² The former Chairman of the South African Competition Tribunal has himself claimed that it is ‘widely accepted that there is a greater role for industrial policy, for targeting support at strategically selected sectors [...] in developing than in developed countries’. Lewis (n 89) 2.

middle of the ordinal public interest scale), whereas developing states favour sector-specific public interest policy and, to a lesser extent, a public interest test (closer to the extremes of the public interest scale). Developing countries are more likely to afford an extensive role to the public interest, but they are also more likely to afford the public interest no scope at all.

Continuing the analysis of this variable, what of the effect that economic development has on the public interest decision-maker a state chooses to appoint? Once again, the literature presents some insights into the norms that we are likely to observe with regards to decision-makers in developed and developing countries respectively. One of these insights has already been referred to in the analysis of legislative framing options above; namely, the suggestion that developing countries have sought to incorporate public interest criteria into their merger regimes in order to provide credibility for NCAs in the eyes of the public.⁹³ If this has indeed arisen in practice, we would expect to see more developing countries appoint NCAs as public interest decision-makers, in the belief that this role will benefit NCAs. A second insight from the literature is provided by Adhikari who suggests that, due to the natural monopolies that endure in numerous developing countries, the role of sector regulators is sometimes considered a necessity.⁹⁴ This could imply that developing countries will also be more likely to prescribe a decision-making role for sector regulators in the merger control context, either as a standalone decision-maker or as part of a dual decision-making set-up. Both of these hypotheses can be tested with a straightforward comparison of the frequencies with the developed and developing country sub-groups.

Figure 7, below, shows the distribution of public interest decision-makers appointed within developed and developing countries.

⁹³ *ibid.*

⁹⁴ Adhikari (n 60) 12.

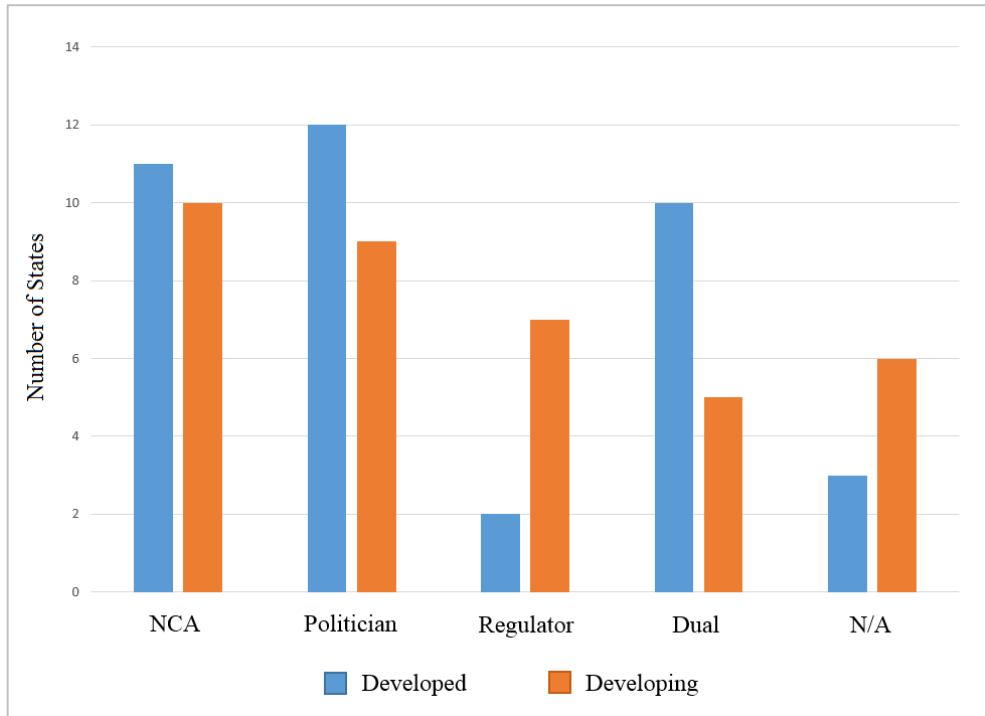


Figure 7. Distribution of public interest decision-makers appointed by developed and developing countries. [Source: Appendix 5C].

On the basis of *Figure 7*, it appears that both of the abovementioned hypotheses possess some credibility. Firstly, with regards to the suggestion that developing countries appoint NCAs to the public interest decision-making role in order to increase their credibility, NCAs are indeed the most popular choice of decision-maker for developing countries. But there is a stark evenness between the number of states adopting NCAs and politicians, which is true of both developed and developing states. The ratio of NCAs to politicians is 11:12 for developed countries and 10:9 for developing countries, which demonstrates that states are equally willing to appoint NCAs and politicians, regardless of their level of economic development. Indeed, 65.7% of developed countries and 61.3% of developing countries have adopted either an NCA or a politician as their decision-maker.⁹⁵ Given the absence of any significant discrepancies between developed and developing countries with regards to these two main decision-makers, it appears very unlikely that economic development has a

⁹⁵ Of the states in the sample that have appointed public interest decision-makers,

statistically significant impact on the type of public interest decision-maker a state appoints.

Secondly, in relation to Adhikari's hypothesis regarding the extended role of regulators in developing countries, *Figure 7* also confirms that standalone regulators are much more likely to be afforded public interest decision-making powers in developing countries compared with developed countries. Sector regulators account for 18.9% of the decision-makers appointed by developing countries in the sample, which is in marked contrast to developed countries, where sector regulators have been the least common appointment to the role (5.3%). This corroborates Adhikari's hypothesis and is also consistent with the aforementioned finding that the single most-common legislative framing option among developing countries is Option 4 (sector-specific public interest policy). Moreover, 28.6% of developed countries have appointed dual decision-makers, compared with 16.1% of developing countries.

Inference 7. *Economic development does not appear to have a significant impact on the type of public interest decision-maker a states chooses to appoint. Developed and developing countries have been equally willing to appoint an NCA or a politician as a standalone decision-maker. Developing countries have made greater use of the specialist skills of regulators (potentially due to the existence of natural monopolies), while developed countries have also been open to the possibility of dual decision-making.*

5.4.3.3. Type of legal system in place

In a similar vein to the geographic locality variable tested above, the type of legal system an individual state has in place can be readily identified, this time by referring to the sources of law that states attribute the greatest weight to. It is possible to identify whether a state enforces a predominantly civil law, common law, religious law or mixed legal system by referring to its legislative framework and its court system. But, although the task of identifying a legal system is relatively straightforward,

establishing how the type of legal system can influence design choices in merger control is less clear. So we can ask whether it is likely that a state will assign a different role to the public interest depending on the type of legal system it operates.

The academic commentary on the relationship between the type of legal system and the design of competition law is sparse. Referring to legal systems in the context of the design of competition agencies, Armoogum and Lyons note the tendency of common law states to afford greater discretion to decision-makers (most notably judges), while civil law countries prioritise the word of the national legislature and afford less discretion to decision-makers.⁹⁶ The additional discretion that decision-makers possess in common law jurisdictions has the advantage of allowing them to adapt their decisions according to economic and social change.⁹⁷ In turn, it has been suggested that this adaptive decision-making makes common law systems suitable for ‘stable, slowly evolving law’, whereas civil law is better suited to states who are attempting rapid legal change and institutional upheaval.⁹⁸ In terms of what we might expect to see in the context of merger control, the discretion that decision-makers enjoy in common law jurisdictions could suggest that common law countries will afford a more prominent role to public interest criteria, in order to give decision-makers the legislative scope in which to exercise their discretion. Conversely, civil law jurisdictions may be more inclined to frame public interest criteria narrowly in order to limit the scope for discretion to be exercised. Alternatively, if a civil law jurisdiction does afford a wide scope to public interest criteria, it may seek to appoint politicians to the decision-making role in order to ensure that this discretion is exercised within the confines of what the legislation intended.

In truth, however, it is difficult to make robust predictions regarding the influence of different types of legal system, not least because the type of legal system a state has in place will itself be influenced by some of the other socio-economic factors that are

⁹⁶ Armoogum and Lyons (n 9) 8.

⁹⁷ Richard A. Posner, *Economic Analysis of Law* (Little, Brown and Company 1973) 569.

⁹⁸ Benito Arruñada and Veneta Andonova, ‘Market Institutions and Judicial Rulemaking’ in Claude Menard and Mary M. Shirley (eds), *Handbook of New Institutional Economics* (Springer 2005) 229.

considered in this section. In addition, empirically testing the influence of legal systems produces its own practical limitations. Of the 75 states in the sample, 48 have adopted civil law, 14 common law, 3 religious law and 10 have incorporated a mixed legal regime. Given the significant proportion of states in the sample that operate under a civil law system, this produces an unbalanced sample that limits the observations one can derive from testing this variable. Nevertheless, by grouping the sample states according to the legal system they have in place, it is still possible that the frequency bar charts can identify the existence of any notable differences between how different legal systems accommodate the public interest in merger control.

Figure 8 shows the distribution of legislative framing options adopted by states that operate under each type of legal system.

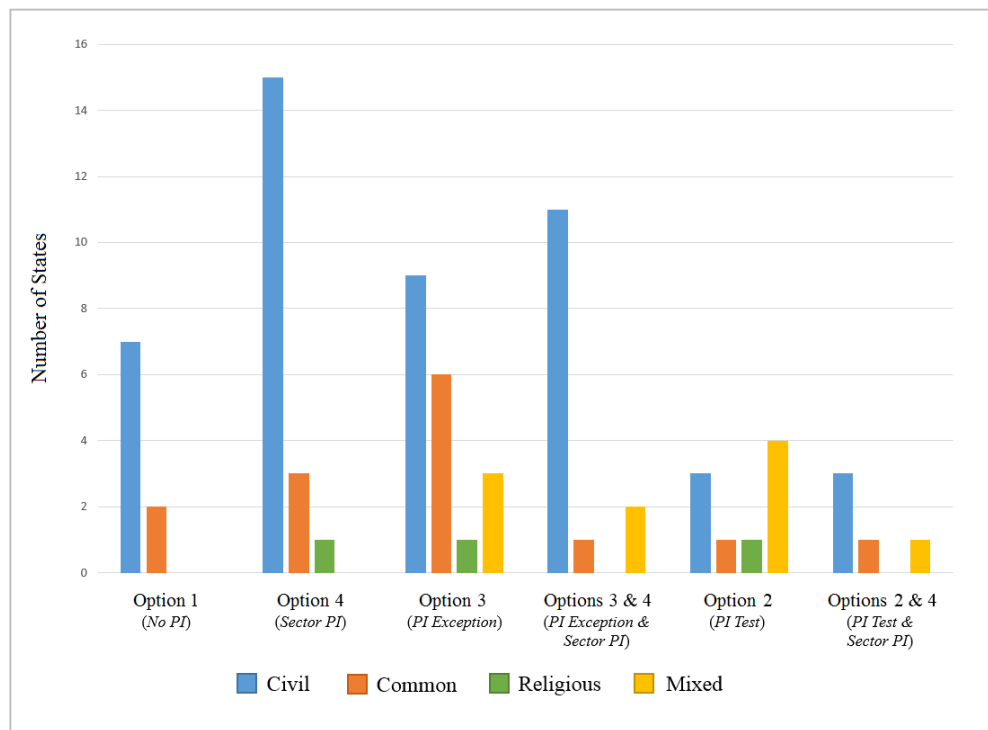


Figure 8. Distribution of legislative framing options adopted by states of different legal systems. [Source: Appendix 6A].

Given that the vast majority of states in the sample are civil law jurisdictions, it is unsurprising that the preferences of civil law countries resemble those of the overall sample. Civil law countries demonstrate a preference for Option 4, Option 3 or a

combination of both, which is consistent with the hypothesis that civil legal systems will frame the public interest narrowly in order to limit the discretion of decision-makers. The most popular legislative framing option among common law states is Option 3, which is adopted by 6 of the 14 common law countries. So despite the expectation that common law systems afford greater scope to the public interest, this is not the case in practice. Another observation one can make regards mixed legal systems, which are represented by the yellow bars in the chart. These appear towards the right-hand side of *Figure 8*, suggesting that states operating under a mixed legal system will typically afford a more expansive role to the public interest. It is unclear why this is the case but, given that mixed legal systems will often entail different bodies of law applying to different groups of people within a state, the interests of these groups may be more readily served if public interest criteria is broadly scoped within legislation.

Aside from these observations, the individual sub-groups are distributed relatively evenly. Indeed, although it would be necessary to increase the sample size in order to conduct a meaningful empirical assessment, the lack of any clear divergences within the individual sub-groups in *Figure 8* implies that the type of legal system has no significant bearing on how a state frames the public interest in legislation.

Inference 8. *The impact that the type of legal system has on a state's choice of legislative framing option is inconclusive from the analysis, due to the unbalanced sample. However, both common law and civil law states show a preference for framing the public interest narrowly within legislation.*

With regards to the relationship between the type of legal system and the choice of public interest decision-makers, we can again draw observations from the frequency

distributions for each type of legal system. *Figure 9*, below, illustrates the distribution of public interest decision-makers appointed within each type of legal system.

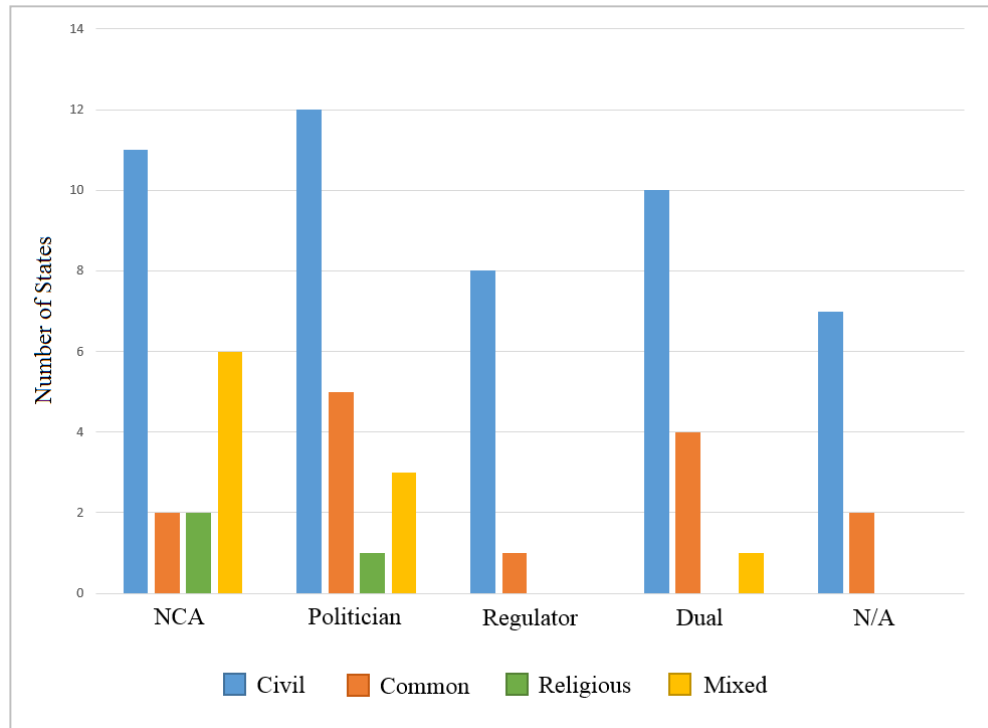


Figure 9. Distribution of public interest decision-makers appointed by states of different legal systems. [Appendix 6B].

Again, as one would expect given its relative size within the sample, the choice of public interest decision-makers in civil law systems is broadly consistent with the choices of the sample as a whole, ie showing a preference for politicians, NCAs and dual decision-makers. In common law countries, politicians are the most favoured decision-makers (35.7%), more so than NCAs (14.3%) and regulators (7.1%) combined. This is an interesting finding given that the literature implies common law states are more willing to delegate discretionary decision-making powers to non-state bodies. One explanation for this is evident from the analysis of the legislative framing options in *Figure 8*, above, which shows that many common law systems choose to frame the public interest as an exception to the substantive test. Like the merger regime in the United Kingdom, which itself operates under a common law system, it may be that national governments have been willing to delegate the majority of merger

decision-making powers to an NCA (or another body), but has reserved itself the power to rule on exceptional mergers affecting the public interest.

In a similar way to the analysis of the legislative framing options, the unbalanced sample makes it difficult to draw robust conclusions on the influence that different types of legal system have on the choice of public interest decision-makers. As such, Chapter 7 of this thesis proposes a way of testing this variable more thoroughly with a larger sample size in future research.

Inference 9. *There is no conclusive evidence to suggest that the type of legal regime a state operates under has any significant bearing on that state's choice of public interest decision-maker. However, a notable observation regards the number of common law states that appoint politicians as decision-makers, which is over twice the number of common law states appointing an NCA.*

5.4.3.4. Effectiveness of domestic governance

Before analysing the potential influence of domestic governance on how states accommodate the public interest, it is worth unpacking the meaning of 'governance' in this context. The World Bank affords a wide-ranging definition to governance, which it refers to as 'the traditions and institutions by which authority in a country is exercised'.⁹⁹ This includes, inter alia, the way in which a country selects and monitors its government, the capacity for government to create and implement sound policies, and the government's respect for citizens and their rights. Two components of this definition are particularly applicable in relation to merger control and the public interest; namely, 'rule of law' and 'political stability'.

⁹⁹ World Bank WGI (n 24).

There are several elements of the rule of law that are of relevance in the context of designing merger control legislation and appointing decision-makers. Generally speaking, a state that adheres to the rule of law will attribute significant value to applying laws with predictability and consistency.¹⁰⁰ Therefore, if consistency between decisions is attributed particular importance in states adhering to the rule of law, the merger laws in these states may afford only a very limited scope to the public interest, to avoid the risk of it being applied inconsistently. Additionally, these states may also be more likely to favour the appointment of NCAs or sector regulators as public interest decision-makers, again due to the consistency and continuity that these bodies provide in contrast to politicians.

Political stability encompasses a host of features, ranging from government stability and ethnic tensions to armed conflict and torture.¹⁰¹ For the purposes of this assessment, government stability perhaps represents the most relevant feature with regards to the design of merger control. For example, one hypothesis that can be put forward is that states with a low rate of government stability will be more likely to assign decision-making powers to NCAs or sector regulators because of the increased likelihood of political upheaval. Indeed, if certain states demonstrate particularly low levels of political and government stability, it follows that these states are likely to experience a change of government more frequently, meaning there are more opportunities for new governments to gain power and exert own influence and ideologies on domestic merger control. If politicians from across different parties recognise the instability that this could also bring to the domestic merger regime, they might be more inclined to delegate the public interest decision-making role to an independent agency (eg an NCA or a sector regulator). As well as facilitating stability and consistency within the merger regime, this also reduces the risk of the public

¹⁰⁰ Edward Iacobucci and Michael J. Trebilcock, 'Canada: The Competition Law System and the Country's Norms' in Eleanor M. Fox and Michael J. Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP 2013) 131.

¹⁰¹ See World Bank WBI (n 24) for definitions of 'political stability' and the other dimensions of governance.

interest criteria being applied differently whenever a new political party gains power.¹⁰²

This analysis makes use of the World Bank’s Worldwide Governance Indicators (WGI) which, as well as providing an aggregated rating for overall governance within a state, also provides ratings for individual components of governance.¹⁰³ The aggregated WGI for each state is represented on a scale from 0-100, with a rating of ‘100’ allocated to states whose domestic governance demonstrates optimal effectiveness.

Figure 10, below, plots the WGI ratings of all 75 states in the sample and groups them according to their choice of legislative framing option. It overlays box-and-whisker plots in order to visually illustrate the distributions of the WGI ratings within each group of states.

¹⁰² This does not, of course, prevent a new government from reforming the merger legislation to suit its own manifesto. But, depending on the level of political instability, time constraints may hamper the ability of a new government to undertake these reforms. Moreover, if all political parties are mindful of the political instability in the country, there may exist a cross-party consensus on limiting political decision-making if rival parties are frequently in power.

¹⁰³ These individual governance indicators include: ‘voice and accountability’, ‘political stability and absence of violence’, ‘government effectiveness’, ‘regulatory quality’, ‘rule of law’ and ‘control of corruption’. World Bank WGI (n 24).

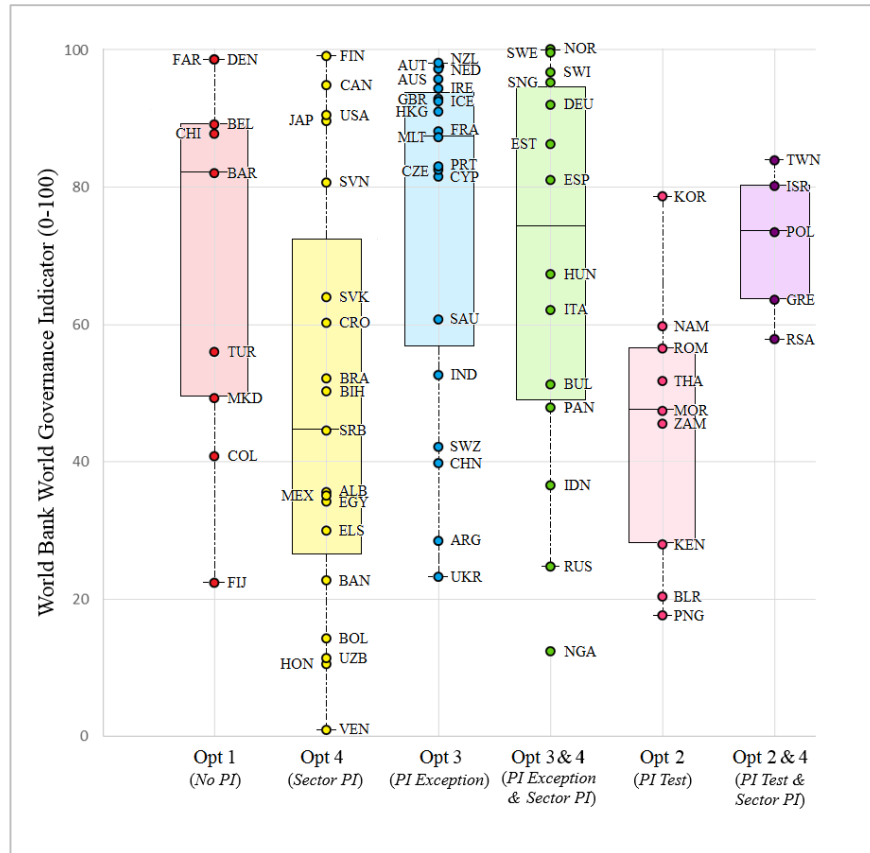


Figure 10. Scatter plot with box-and-whisker overlay showing states' ratings for domestic governance and the legislative framing option adopted. [Source: World Bank Worldwide Governance Indicators 2013].

As *Figure 10* illustrates, the WGI ratings within each group appear to be very broadly distributed, with the notable exception of the states in the 'Options 2 & 4' group, which are clustered between the values of 57.82 (South Africa) and 83.89 (Taiwan). The Option 4 category, in particular, demonstrates an extremely broad distribution of states.¹⁰⁴ The means of each group also reveals some interesting results. On average, states that adopt Option 4 or Option 2 perform relatively poorly in relation to governance (both have a median average WGI rating between 40-50). In contrast, states that adopt one of the mixed options ('Options 3 & 4' or 'Options 2 & 4') have a median WGI rating between 70-80, and states adopting Option 1 or Option 3 have

¹⁰⁴ Of the states adopting Option 3, Venezuela has the poorest WGI rating (0.95) and Finland the highest (99.05). The spread of the distribution is so broad that neither of these states amount to statistical outliers. Indeed, the only outlier in the entire sample is Nigeria, whose WGI rating of 12.32 falls below the lower fence of the Options 3 & 4 group.

the highest median ratings (80-90). These medians do not appear to directly corroborate the hypothesis that states with a high adherence to the rule of law (and, as such, a high WGI rating) will generally frame public interest criteria narrowly. However, if we focus on the states that have achieved the highest WGI ratings (90 and over), we observe that not one of these states feature in Option 2 or Options 2 & 4, the options that afford the greatest legislative scope to the public interest.

The wide distributions and the lack of any notable pattern between the points in *Figure 10* would suggest that there is no relationship between governance and legislative framing options. However, we can test this hypothesis using inferential statistical methods. One way of testing whether domestic governance influences the choice of legislative framing option is to conduct an analysis of variance (ANOVA), which can be used to determine whether one of the legislative framing groups is significantly different to the other groups.¹⁰⁵ With reference to the ANOVA carried out in Appendices 7A and 7B, the test finds that there actually is evidence within the sample that suggests governance has a statistically significant influence on the choice of legislative framing option.¹⁰⁶ This would appear to be a reflection of the considerable differences between some of the median WGI ratings within the groups of legislative framing options, as referred to in the previous paragraph. The relationship itself is not linear; it is not simply the case that a higher level of governance will see a state afford a lower degree of scope to the public interest (or vice versa). Rather, the respective medians within each group suggest the distribution is multimodal, with Option 1 and Option 3 representing the preferred choices for states with effective domestic governance. Therefore, in statistical terms at least, we can draw the conclusion that it

¹⁰⁵ ANOVA is appropriate in this instance because we are comparing more than two groups (ie a multivariate test). It was appropriate to use a *t*-test (a bivariate test) for the analysis of economic development in Section 5.4.3.2 because the analysis was framed to compare only two groups, developed and developing countries.

¹⁰⁶ The ANOVA in Appendix 7B tests the null hypothesis that the effectiveness of domestic governance has *no* significant influence on how a state frames the public interest, to a $p = 0.05$ level of significance. The test returns an F-value of 2.9823. This exceeds the critical F-value (2.35) which denotes the upper limit of statistical similarity between different groups. As a consequence, we reject the null hypothesis.

is likely that the ‘effectiveness of domestic governance’ has a tangible impact on a state’s choice of public interest decision-maker.¹⁰⁷

Inference 10. *The ‘effectiveness of domestic governance’ within a state does appear to have a statistically significant bearing on how that state chooses to frame public interest criteria within merger legislation. States with a highly effective system of governance have all chosen to frame the public interest narrowly, potentially as a means of ensuring consistency between decisions (an important factor of the rule of law).*

Given the influence that domestic governance appears to have on how the public interest is framed in legislation, do we observe a similar influence with regards to the choice of public interest decision-maker? *Figure 11*, below, plots the WGI ratings of the states according to their choice of public interest decision-maker.

¹⁰⁷ An extension of this analysis would be to use multivariate inferential tests to assess the influence of the ‘rule of law’ and ‘political stability’ components separately.

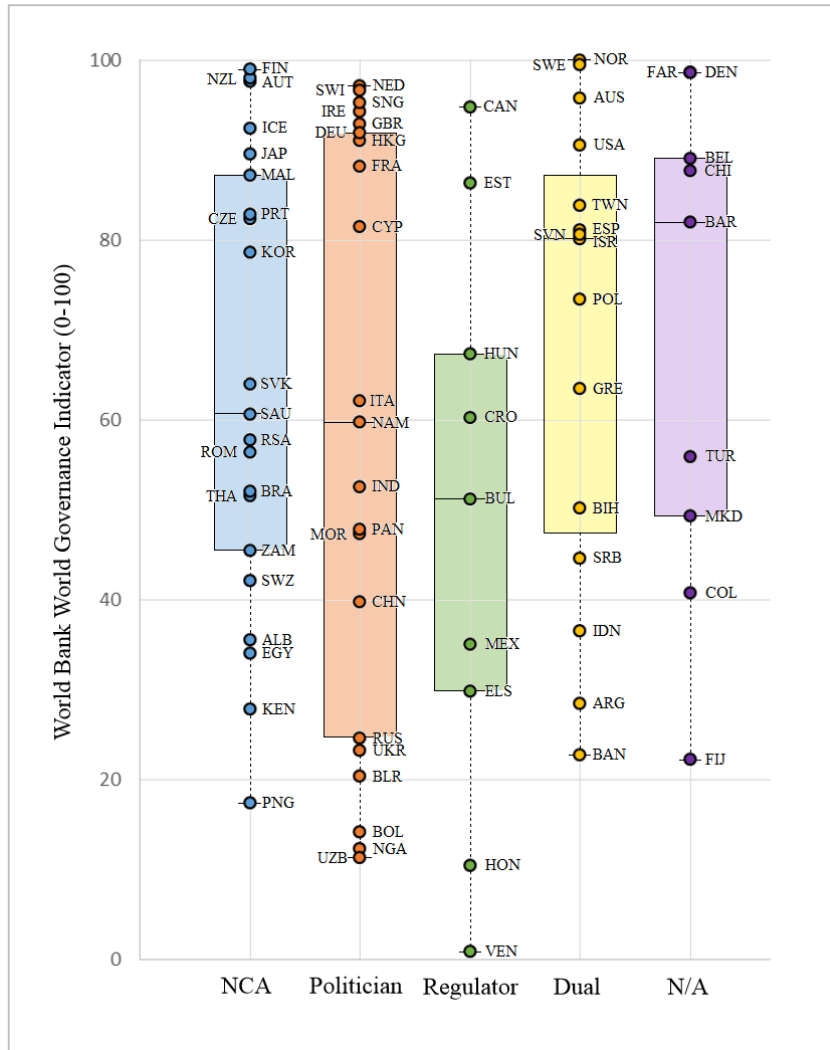


Figure 11. Scatter plot with box-and-whisker overlay showing states' ratings for domestic governance and the public interest decision-maker appointed. [Source: World Bank Worldwide Governance Indicators 2013].

Once again, the box-and-whisker diagrams demonstrate a very broad spread of WGI ratings within each group of decision-makers. However, on this occasion, we do not observe such significant differences between the median WGI ratings of each group. Indeed, the median average WGI ratings of states adopting either an NCA, politician or sector regulator only range from 51.18 to 60.66.¹⁰⁸ If domestic governance does have a tangible influence on the choice of decision-maker, we would expect to observe

¹⁰⁸ The median WGI ratings for the states in each decision-maker group are: 60.66 (NCA), 59.72 (Politician), 51.18 (Regulator), and 80.09 (Dual). The median rating of states that do not consider public interest criteria and, as such, do not appoint a public interest decision-maker is 81.99.

greater distortions between these medians. An ANOVA test can again be used to estimate whether it is likely that this influence exists. This time, the ANOVA finds there is no statistically significant relationship between domestic governance and the type of public interest decision-maker operating in a state.¹⁰⁹

Figure 11 can also be used to establish whether states with high WGI ratings are more likely to appoint non-political expert decision-makers – namely, independent NCAs and sector regulators – in order to facilitate consistency between merger decisions. Interestingly, *Figure 11* actually implies that the reverse is true, and that states with a high WGI rating prefer to appoint politicians as public interest decision-makers. In total, 19 of the states that appoint public interest decision-makers have a WGI rating of 90 or over, and 7 of these states have chosen to appoint politicians. This is in contrast to NCAs (5 states), sector regulators (1 state) and dual decision-makers (3 states). However, one should also bear in mind that, of the lowest ranking states (the 13 states with a WGI rating of 30 or under), 6 of these states have chosen to appoint politicians. We therefore observe this somewhat odd finding, whereby politicians seem to be the favoured decision-makers of (i) countries with very effective domestic governance, and (ii) countries with very ineffective domestic governance.

Inference 11. *The type of public interest decision-maker that a state decides to appoint is not significantly influenced by the effectiveness of its domestic governance. Politicians are the preferred choice of public interest decision-maker for both states with a very high level of effective governance and states with a very low level of effective governance.*

¹⁰⁹ See Appendices 7C and 7D for the statistical descriptives of the sample and the ANOVA. Once again, the ANOVA tests the null hypothesis that the effectiveness of domestic governance has *no* significant effect on a state's choice of public interest decision-maker to a $p = 0.05$ level of significance. The analysis returns an F-value of 0.9295 which sits below the critical F-value (2.50). As such, we fail to reject the null hypothesis.

5.4.3.5. *Openness to foreign investment*

The fifth and final socio-economic variable that this chapter examines is a state's 'openness to foreign investment'. Does there exist a discernible relationship between how open or closed a state is to foreign direct investment (FDI),¹¹⁰ and how that state chooses to accommodate the public interest in its domestic merger regime? There is literature that alludes to this possibility. Economic scholars, for example, have observed a tendency for some states to apply merger control strategically in order to promote national interests – such as the employment of domestic citizens and the competitiveness of domestic firms – at the expense of foreign competitors.¹¹¹ One way for a state to serve these strategic national interests is to formulate public interest criteria that enables mergers to be assessed on grounds that promote domestic firms and discriminate against foreign bidders. For this reason, we might expect states that are relatively closed to FDI to afford a broad scope to public interest criteria in their merger control legislation. This is a result to look out for when it comes to testing the influence that 'openness to foreign investment' has on the choice of legislative framing option.

However, there are also good reasons for anticipating a completely different result. Countries often have separate laws for regulating domestic mergers and FDI, sometimes justifying this on the basis that FDI poses additional risks to national security and strategic interests.¹¹² In theory, states can use these foreign investment

¹¹⁰ The intricacies of FDI are plentiful, but they broadly take the form of either (i) a foreign takeover (where foreign firms invest or gain ownership of an existing domestic firm), or (ii) greenfield entry (where foreign firms set up business from scratch in a domestic country). See Financial Times, 'Definition of foreign direct investment' <<http://lexicon.ft.com/Term?term=foreign-direct-investment>> accessed 24 September 2015.

¹¹¹ Mario Mariniello, Damien Neven and Jorge Padilla, 'Antitrust, Regulatory Capture and Economic Integration' (2015) Bruegel Policy Contribution 2015/11, 4 <<http://www.bruegel.org/publications/publication-detail/publication/891-antitrust-regulatory-capture-and-economic-integration/>> accessed 27 July 2015.

¹¹² For an overview of FDI rules in Australia, China, France, Germany, Russia, the United Kingdom, and the United States, see Alex Chisholm and Nelson Jung, 'The Public Interest and Competition-based Scrutiny of Mergers: Lessons from the evolution of merger control in the United Kingdom' (2014) 4(1) CPI Antitrust Chronicle 17-22 <<https://www.competitionpolicyinternational.com/the-public-interest-and-competition-based-scrutiny-of-mergers-lessons-from-the-evolution-of-merger-control-in-the-united-kingdom-/>> accessed 25 September 2015.

rules to pursue industrial policy goals; for example, by using FDI rules to block foreign takeovers and, in turn, promote and maintain ‘national champions’. Indeed, where industrial policy goals are pursued, the dynamics between merger control and FDI regulation is interesting, because FDI regulation can either be used as a complement to merger control or as an alternative to it. If the latter is true (ie states prefer to frame public interest and industrial policy criteria in FDI regulation, rather than in merger control), we might expect states that are closed to FDI to afford less scope to the public interest in merger control.

We can also frame a hypothesis with regards to the potential effect that ‘openness to foreign investment’ has on a state’s choice of public interest decision-maker. States that have a tendency to block foreign takeovers or heavily restrict FDI are, in effect, exerting their control over domestic ownership. Therefore, this would also imply that these states will want to exert greater control over domestic merger control and, as a consequence, they are more likely to appoint politicians as public interest decision-makers in order to ensure the ‘word of the State’ is given effect to. This is another outcome we can expect to observe in the analysis.

In terms of sourcing data for the analysis, a measure for the ‘openness to foreign investment’ variable is available from the OECD’s FDI Regulatory Restrictiveness Index (hereafter, the ‘FDI Index’).¹¹³ The FDI Index offers an aggregated estimate for the level of restrictiveness that countries impose on foreign investment within their domestic legislation.¹¹⁴ The estimates are derived by rating the individual levels of restrictiveness in 22 different industries within each country. These ratings take account of what the OECD describes as ‘the four main types of restrictions on FDI’: (i) foreign equity limitations, (ii) screening or approval mechanisms, (iii) restrictions on the employment of foreign nationals as key personnel, and (iv) operational

¹¹³ OECD, ‘FDI Regulatory Restrictiveness Index’ (*OECD Investment*, June 2014) <www.oecd.org/investment/fdiindex.htm> accessed 8 January 2015. The analysis in this section uses the ratings from the 2014 study, which are the most recent at the time of writing.

¹¹⁴ Although a rating in the FDI Index measures how ‘closed’ a state is to foreign investment, this same rating can be interpreted to measure how ‘open’ a state is to foreign investment.

restrictions (eg restrictions on the repatriation of capital or on land ownership).¹¹⁵ The ‘restrictiveness’ of a given state is indicated by a rating between 0 and 1, with ‘0’ indicating a state that imposes no restrictions on foreign investors, and ‘1’ indicating a state that restricts all foreign investment.¹¹⁶ The FDI Index does have its limitations. For example, it considers the restrictiveness posed by legislative provisions, but it does not take account of how often these provisions are exercised or the quality of the institutions that conduct the assessment.¹¹⁷ Furthermore, the FDI Index itself takes account of any restrictive provisions embedded in domestic merger control (whether these be public interest provisions or otherwise). Given that they each take account of domestic merger control, there may be an inherent correlation between the FDI Index ratings and the legislative framing options adopted by the states in this sample, which is an issue to bear in mind when interpreting the results of this section. A final limitation to note is the number of states considered in the FDI Index. The 2014 version of the Index includes aggregates for 58 countries, but only 46 of these countries overlap with the 75 states in the domestic data set that the chapter has utilised up to this point. This means that some of the legislative framing options or public interest decision-makers are likely to be underrepresented in the analysis that follows.

The ‘openness to foreign investment’ variable can be tested with similar techniques to those used for testing the impact of domestic governance in section 5.4.3.4, above. Firstly, we can analyse the potential influence that openness to foreign investment has on the way states choose to frame the public interest within merger legislation.

¹¹⁵ Blanka Kalinova, Angel Palerm, and Stephen Thomsen, ‘OECD’s FDI Restrictiveness Index: 2010 Update’ (2010) OECD Working Papers on International Investment 2010/03, 6 <www.oecd-ilibrary.org/finance-and-investment/oecd-s-fdi-restrictiveness-index_5km91p02zj7g-en> accessed 12 April 2015.

¹¹⁶ As will become apparent in this section, no state within the FDI Index has had a restrictiveness rating that exceeds 0.5 in practice. The state with the highest level of restrictiveness in the OECD sample is China, with an FDI Index of rating of 0.418. For a breakdown of the ratings for individual states, see Appendix 9, row 14.

¹¹⁷ Stephen Thomsen, ‘OECD FDI Regulatory Restrictiveness Index: A tool for benchmarking countries, measuring reform and assessing its impact’ (Overview presentation, OECD 2014) 2 <www.slideshare.net/OECD-DAF/oecd-fdi-regulatory-restrictiveness-index?ref=http://www.oecd.org/investment/fdiindex.htm> accessed 12 April 2015.

Figure 12 plots the FDI restrictiveness ratings of the states according to their choice of legislative framing options.

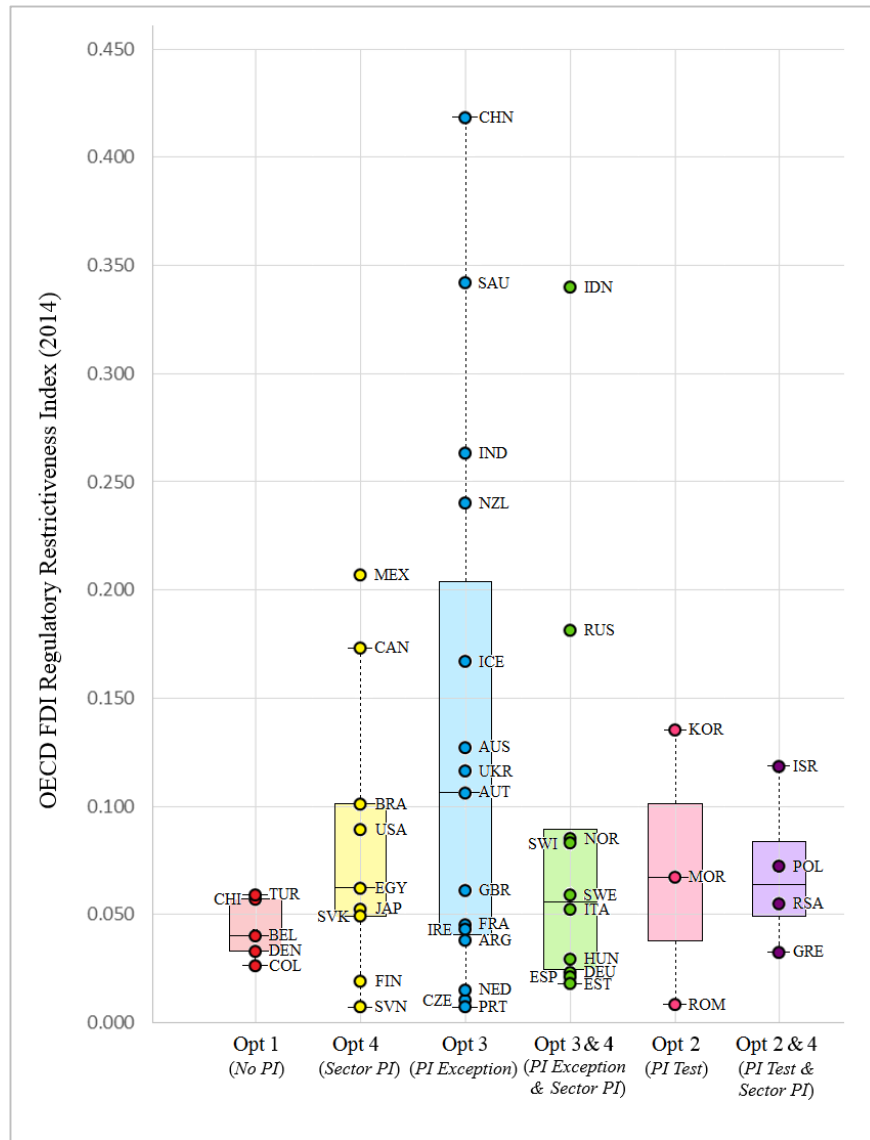


Figure 12. Scatter plot with box-and-whisker overlay showing states' ratings for FDI restrictiveness and choice of legislative framing option. [Source: OECD FDI Regulatory Restrictiveness Index 2014].

A striking initial observation that can be derived from *Figure 12* is the broad spread of FDI restrictiveness ratings within the group of states that choose to frame public interest criteria as an exception to the substantive test (Option 3, represented by the

blue-shaded region).¹¹⁸ In contrast, the interquartile ranges for the other groups of legislative framing options are relatively narrow, particularly those states that choose not to accommodate public interest criteria (Option 1, illustrated by the red points). This difference between the spreads of the distributions can, in part, be attributed to the revised sample size, where the states adopting Option 3 are comparably well-represented in relation to other the groups, thus increasing the likelihood of a broad distribution.¹¹⁹ Nonetheless, the median average FDI restrictiveness rating for states adopting Option 3 is also notable higher than the other legislative framing options, which implies that states which frame the public interest as an ‘exception’ in domestic merger control are also more likely to impose more restrictions on foreign ownership and investment. This is suggestive of a high instance of broad public interest exceptions, such as ‘national security’ or ‘national interest’ exception, which apply to all mergers but are inherently more likely to be of relevance to mergers that involve foreign bidders. However, this finding aside, *Figure 12* reveals no obvious pattern to hint at the relationship between FDI openness and the choice of legislative framing option. Indeed, by conducting an ANOVA in the same way as in the previous section, it finds that there is no statistically significant difference between the variances of the six legislative framing groups.¹²⁰ We can therefore conclude that ‘openness to foreign investment’ has no tangible influence on how states choose to frame the public interest in legislation.

Inference 12. *A country’s ‘openness’ to foreign investment has no tangible impact on how a state chooses to frame public interest criteria in its merger laws. Indeed, countries that frame the public interest as an exception to the substantive test for assessment (Option 3) demonstrate a particularly wide range of different attitudes to*

¹¹⁸ In fact, the distribution of the states adopting Option 3 is so broad that neither China (CHN) nor Saudi Arabia (SAU) are statistical outliers, despite being the most restrictive states in the FDI Index.

¹¹⁹ In contrast, Option 4 (sector-specific public interest policy) is underrepresented, having constituted 19 out of the 75 states (25.3%) in the original sample, but only 9 of the 46 states (19.6%) in the revised sample.

¹²⁰ See Appendix 8A for FDI data descriptives, and Appendix 8B for the corresponding ANOVA. The ANOVA tests the null hypothesis that ‘openness to foreign investment’ has no discernible impact on the choice of legislative framing option, to a $p = 0.05$ level of significance. This returns an F-value of 0.8907, which is lower than the critical F-value (2.45). Thus, we do not reject the null hypothesis.

foreign investment. However, states that do not consider public interest criteria in their merger assessments (Option 1) are, on average, the states that show the most ‘openness’ to foreign investment.

Finally, we can test to see whether there exists a noticeable relationship between a state’s ‘openness to foreign investment’ and the type of public interest decision-maker it appoints. Above, it is suggested that countries that are ‘closed’ to foreign investment are more likely to appoint politicians as decision-makers, but is this actually the case? *Figure 13*, below, plots the FDI restrictiveness ratings of the states according to their choice of public interest decision-maker.

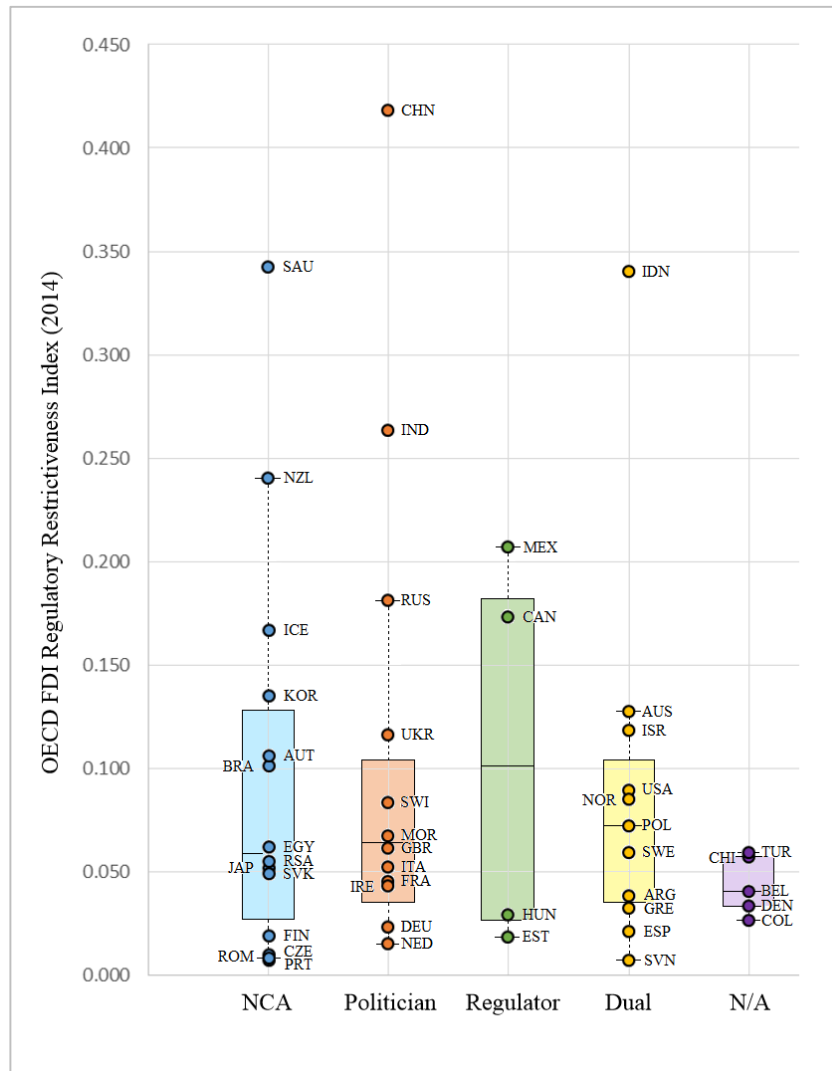


Figure 13. Scatter plot with box-and-whisker overlay showing states’ ratings for FDI restrictiveness and public interest decision-maker. [Source: OECD FDI Regulatory Restrictiveness Index 2014].

From an initial glance at *Figure 13*, we see that 2 out of the 4 states that are most ‘closed’ to foreign investment do indeed appoint politicians as public interest decision-makers.¹²¹ However, both of these states are statistical outliers in terms of their position relative to the other states in the sample.¹²² The medians of each group actually reveal that the states that are more ‘closed’ to foreign investment are most likely to appoint regulators as their public interest decision-makers (see the median of the green shaded region), but this is hardly a robust observation given it is based on the FDI restrictiveness ratings of only 4 states. Lastly, an ANOVA of the sample again finds there to be no statistically significant relationship between ‘openness to foreign investment’ and the choice of public interest decision-maker.¹²³

Inference 13. *A state’s ‘openness to foreign investment’ has no significant impact on its choice of public interest decision-maker. There is an indication that states that demonstrate a restrictive stance towards foreign investment are more likely to appoint sector regulators, but the sample would need to be expanded in order to corroborate this.*

5.4.1. Remarks on the influence of socio-economic variables

This section has undertaken an empirical analysis to assess the influence that key socio-economic variables have on the way in which states accommodate public interest criteria in their merger control regimes. In doing so, it has made a number of preliminary observations regarding the potential effect of (a) geographic locality, (b) economic development, (c) the type of legal system in place, (d) the effectiveness of domestic governance, and (e) openness to foreign investment.¹²⁴ It could be argued

¹²¹ The four states with an FDI restrictiveness rating over 0.25 are: China and India (who both appoint politicians), Saudi Arabia (which appoints an NCA), and Indonesia (which has adopted a dual decision-making arrangement).

¹²² The upper fence for the FDI restrictiveness ratings in the ‘Politicians’ group is 0.246, which both China (0.418) and India (0.264) exceed.

¹²³ See Appendices 8C and 8D. On this occasion, the ANOVA tests the null hypothesis that ‘openness to foreign investment’ does not significantly influence the choice of public interest decision-maker to a $p = 0.05$ level of significance. The ANOVA returns an F-value of 0.4867, which is lower than the critical F-value (2.60). Thus, we do not reject the null hypothesis.

¹²⁴ These findings are detailed in Inferences 3-13, above.

that each of these variables has had at least some discernible impact on how states have accommodated the public interest, even if this merely relates to only a single type of legislative framing option or decision-maker. However, in terms of statistical significance, the only tangible relationship that the analysis uncovers is the influence that the ‘effectiveness of domestic governance’ has on how a state frames public interest within its merger legislation. This specifically infers that states demonstrating a high degree of governance will tend to either avoid considering public interest criteria completely (Option 1), or will frame the public interest criteria narrowly as an ‘exception’ to the substantive test for assessment (Option 3).

In many ways, the fact that there are very few observable patterns between the socio-economic variables and the methods of accommodation is an interesting finding in itself. It would seemingly imply that none of the socio-economic variables examined in this section are key determinants in how states choose to accommodate the public interest. But given that other studies have referred to the significant potential influence of these socio-economic variables in competition law – in particular, geographic locality and economic development – it is remarkable that the design and implementation of merger control rules does not correlate with any of these variables. Perhaps the main determinant of how public interest is accommodated in merger control is a socio-economic variable that has not been discussed in this chapter. The ‘goals of competition law’ – which this chapter has chosen not to assess due to practical issues posed by modelling them empirically – could well be one such determinant. Alternatively, it is certainly possible that public interest accommodation is determined by more than one of these variables. If this is the case, it becomes more difficult to empirically analyse the influence of individual variables independently, in the knowledge that other factors are also exerting an influence.¹²⁵ Indeed, as has been mentioned above, one should also bear in mind the potential impact of knowledge exchange between competition regimes. If knowledge exchange is prominent between

¹²⁵ A possible way to overcome this would be to perform a ‘Two-way ANOVA’ using different combinations of socio-economic variables. This can be used to estimate the combined influence of two dependent variables on a single independent variable.

the 75 states in the sample, it could be inferred that these states have not so much been influenced by socio-economic variables but, rather, by the existing laws and procedures of other countries.

5.5. CONCLUDING REMARKS

This chapter has drawn insights on the role that domestic states have afforded to the public interest in merger control by pursuing three distinct research avenues: (i) by identifying the different methods that are available to states who seek to accommodate the public interest; (ii) by considering the methods of accommodation that states have adopted in practice; and (iii) by analysing the potential influence that key socio-economic variables may have on the choices that states exercise when accommodating public interest criteria. By adopting an empirical approach to pursue these avenues, the chapter makes a number of revelations and dispels several myths regarding the wider role that the public interest plays in modern-day merger control.

The study estimates that approximately 88% of domestic merger regimes incorporate some form of public interest criteria within their merger control laws. This corroborates the suggestion that ‘public interest’ does not merely reside on the periphery of international merger control but, rather, retains the potential to influence merger assessments in most jurisdictions. This represents a key motivating factor for the continued research and debate on the role that public interest considerations should play in merger control and competition policy in general.

Based on the assumption that the two main choices a state must make before accommodating public interest criteria are (a) *how to frame the public interest in merger legislation*, and (b) *who to appoint as decision-maker*, the chapter finds that there are 21 possible approaches that states can implement. Within the sample, 15 of these approaches have been implemented in practice, with the most popular being: (i) to avoid considering public interest criteria completely, (ii) to appoint a politician and frame the public interest as an ‘exception’ to the substantive test, and (iii) to appoint

a national competition authority and frame the public interest as an ‘exception’ to the substantive test. The wide variety of different approaches that states have adopted in practice signals a lack of substantive and institutional convergence with regards to how public interest criteria is accommodated in domestic merger control around the world.

Overall, the vast majority of states that incorporate public interest criteria within their merger laws have chosen to frame this criteria narrowly, i.e. as an ‘exception’ to a competition-based test, or as part of a parallel sector-specific policy.¹²⁶ This illustrates a general preference for states to assess mergers according to competition criteria as a default position, and implies that these states appreciate the wider welfare benefits that a competition-based approach can facilitate, in addition to consumer benefits. Moreover, national competition authorities and politicians have each proved to be equally popular appointments to the public interest decision-making role, with 63.6% of states appointing one or the other. This offers an intriguing insight into the ongoing debate regarding political involvement in competition policy, as it infers that an equal proportion of states are convinced by the perceived advantages of NCAs making decisions (i.e. making effective use of their economic expertise and relative independence) and political decision-making (i.e. satisfying the constitutional belief that matters of significant ‘public interest’ should be decided by publically-elected representatives). In practice, it is wholly apparent that states take different sides in this debate, and this is a catalyst for institutional divergence between states.

Finally, the chapter’s statistical analysis of key socio-economic variables acts to dispel a number of myths often associated with states that consider public interest criteria. For example, the geographic location of a state appears to have little bearing on how that state chooses to accommodate the public interest; although, certain patterns emerge, including the tendency of African states to assign an extensive role to the public interest and to appoint NCAs as decision-makers. However, the empirical

¹²⁶ Of the states that have chosen to afford consideration to public interest criteria, 78.8% have framed this criteria narrowly within merger control legislation.

analysis finds that the level of effective governance within a state often corresponds with that state's design choices, with regards to framing public interest criteria within merger legislation. States with a highly effective system of governance tend to frame the public interest narrowly, perhaps as a means of facilitating consistency and predictability between decisions.

Contrary to oft-cited assertions in the existing literature, there is no evidence to suggest that the economic development of a state has any statistically significant correlation with how much influence it chooses to afford to public interest criteria. Having said this, states that afford an *extensive* role to the public interest are more likely to be developing countries.¹²⁷ Therefore, if the epistemic communities (e.g. the ICN, OECD, UNCTAD, etc) believe that states adopting an 'extensive public interest role' pose an obstacle to effective cross-border merger control, these communities should afford due consideration to economic development variables if they decide to draft 'International Best Practice Guidelines'.

¹²⁷ Which is intriguing given that the majority of states that afford the public interest no scope whatsoever are also developing countries.

CHAPTER 6

Public Interest Considerations in Merger Control: Towards a Synthesis

6.1. INTRODUCTION

The preceding discussion in this thesis has highlighted a number of important issues with regards to the role of the public interest in modern-day merger control. Chapter 2 drew emphasis to the fact that public interest and competition goals are, in the most part, compatible with each other. Yet it emphasises the inevitable conflicts that arise within any merger regime that adopts a ‘mixed’ approach to merger control, ie one that affords consideration to both competition and public interest criteria.

Chapter 3 accentuates the significance of the ‘goals’ that a merger regime – and competition law in general – seeks to achieve, by examining the unique challenges faced by the European Union, as a supranational entity, in giving effect to the interests of 28 Member States. It found that, in spite of the fact that the European Merger Regulation (EUMR) affords scope for the European Commission to consider wider Treaty goals when deciding on a merger, the Commission has instead decided to adopt a strict competition-based approach in practice, in pursuance of its consumer welfare imperative.

Chapter 4 highlighted the potential pitfalls that can befall individuals who are assigned the role of deciding mergers according to public interest criteria, noting the chequered experience of the Secretary of State in the United Kingdom. A steady flow of controversial cases, perhaps most notably *NewsCorp/BSkyB*, have shone a spotlight on the prospect of decision-makers being exposed to unwarranted lobbying and bias during the assessment process. Equally, although the UK merger legislation specifies restricted public interest ‘exceptions’, the existence of a residual power for the

Secretary of State to propose additional exceptions at short notice raises important legal certainty concerns.

Finally, the empirical analysis in Chapter 5 presented a snapshot of the modern-day role played by the public interest in merger regimes across the world. It estimated that 88% of merger regimes continue to afford scope to public interest criteria, and that domestic states have sought to accommodate this criteria in a wide variety of ways. It therefore indicates that efforts to encourage states to converge towards a pure competition-based approach to merger control – or to at least converge towards a harmonised approach – have been hindered by an inherent need for states to reserve the power to safeguard their national public interests.

Having drawn a number of micro-legal conclusions in each of the preceding chapters, this chapter seeks to utilise these insights in order to inform conclusions on the macro-legal issues that were presented in Chapter 2. Specifically, this chapter revisits and re-examines the main concerns that have been expressed in relation to affording a role to the public interest in merger control and, therein, evaluates the prospect of alleviating these concerns under a ‘best practice’ framework. Section 6.2 sets the foundations for the discussion by highlighting some of the key findings of the thesis and, in light of these, drawing the conclusion that public interest considerations will continue to play a role in merger regimes across the world. Section 6.3 evaluates the main concerns expressed in relation to the use of public interest criteria in merger control, with a specific focus on the difficulties of (i) framing the public interest in merger legislation, and (ii) appointing and maintaining an effective decision-maker, using UK reform proposals as a case study. Section 6.4 proposes a framework in which states can seek to accommodate public interest criteria in an ‘optimal’ way. Section 6.5 concludes.

6.2. WHY PUBLIC INTEREST IS HERE TO STAY

Before addressing the individual concerns presented by the accommodation of public interest considerations in merger control, there is a natural question to ask: is it worth it? Is it worth embedding public interest criteria into merger law if it poses the risk of undermining the robustness and credibility of the merger control regime, particularly if many public interest goals can be realised with adherence to competition-based assessments? This question goes to the very heart of the debate in this area. David Lewis, the former Chairman of the South African Competition Tribunal, once said he had come to deal with the public interest in the same way as a family deals with a ‘mad uncle’ – with ‘wary respect’:

We may try and ignore him; we may even deny his existence. But he somehow manages to turn up, invited or not, at every major family event. For the most part he turns out to be quite an amiable, agreeable old chap, but he does have the potential to behave in a very unpredictable manner, one that causes severe embarrassment to a smug, complacent family, often threatening to tear it apart and reduce its reputation and standing in the society at large. He is nevertheless often respected by the younger members of the family, who feel that he has insights about the real world lacking in the more staid leaders of the family.¹

This metaphor presents an apt description of the public interest as an abstract notion – one that is compatible with competition goals in the majority of cases, but is inherently prone to conflict from time-to-time. The ‘staid leaders of the family’ in Lewis’ analogy can be said to be the ‘competition purists’, those who disregard the relevance of the public interest and who believe that a strict competition-based approach to merger control will achieve not only welfare and efficiency goals, but

¹ David Lewis, ‘The Role of Public Interest in Merger Evaluation’ (ICN Merger Working Group, Naples, 28-29 September 2002) <<http://www.comptrib.co.za/assets/Uploads/Speeches/lewis5.pdf>> accessed 20 September 2015.

wider social goals also.² The ‘younger members of the family’ are very much the dissenting voices of the literature in this area; those who believe public interest has a significant part to play in merger control, despite the concerns it has been associated with. These separate schools of thought are not always conducive to sustaining ‘happy families’ in the worldwide merger policy landscape but, as this thesis has discovered, it is clear that the vast majority of countries believe public interest considerations should play some role in merger assessments.³ Moreover, it has found that almost eight-in-ten of these countries attribute a narrow interpretation to the public interest;⁴ one that means public interest criteria will only be considered in mergers that raise certain social concerns or that take place in specific markets. Therefore, if we refer back to the ‘public interest spectrum’ illustrated in *Figure 1* of this thesis,⁵ it appears highly likely that the ‘modern-day approach’ to international merger control lies within the ‘Strict competition-based’ field, but closer to a ‘Mixed’ approach than to a ‘Pure competition-based’ approach.

Given that most countries continue to demonstrate a preference for accommodating public interest criteria domestically, one can draw a second inference: namely, that the concerns attributed to public interest criteria have not prompted countries to completely eradicate such criteria from their merger laws. That said, these concerns may well have proved a key catalyst in the decision of many countries to opt for formalising a narrow interpretation of the public interest in practice.⁶ If we look at the nature of these concerns, there is a common theme that unites them which, to a certain extent, explains why most countries have not been deterred from affording scope to the public interest. In relation to the concerns regarding *institutional arrangement*, we seek to establish ‘who’ should make decisions in the public interest and how this can be facilitated. With regards to applying *protectionist measures*, we concern ourselves

² The European Commission could be said to fall within this category, given its seemingly unwavering commitment to a strict competition-based approach to merger control; see Section 3.4.2.

³ An estimated 88% of domestic merger regimes adopt some form of public interest criteria.

⁴ *ibid.* 78.8% of countries that accommodate public interest criteria do so narrowly.

⁵ Section 2.3.3.

⁶ For example, one of the reasons underpinning the UK’s decision to move from a broad public interest test to a competition-based test under the Tebbit Doctrine was to reduce legal uncertainty; *HC Deb 5 July 1984, vol 63, cols 213-14W.*

with how one goes about preventing the threat of domestic governments abusing their powers in order to facilitate ‘national champions’. To address the fear of *diluting the key objectives* of competition law, the question becomes how we can possibly accommodate public interest objectives without compromising welfare and efficiency goals. And in terms of overcoming *legal uncertainty*, we question the need for incorporating public interest criteria when economic criteria provide the consistency, predictability and transparency that play a pivotal role in any merger control regime. The fundamental – and uniting – problem at the heart of each of these concerns is one of ‘practicality’. In each instance, there is a practical dilemma that can be remedied in one of two ways, namely: (i) by attempting to alleviate the concern by introducing clear guidance, regulation and institutional reform, or (ii) by overlooking the applicability of public interest concerns in their entirety. If countries choose the latter approach and, in essence, ‘sweep the public interest under the carpet’, this would amount to allowing procedural norms to dictate substantive norms. In other words, the country would be making a conscious choice to overlook the attainment of wider public interest goals and, instead, prioritise procedural ‘convenience’ by installing a strict competition-based approach to merger assessment.

This is not to discount the benefits of a strict competition-based approach, which has the potential to deliver significant and substantive benefits to consumers, while also promoting legal certainty within the assessment process. However, it may be argued that these procedural norms – consistency, predictability and transparency – are not, in themselves, justifiable reasons for prioritising a strict competition-based approach ahead of one that also considers public interest goals. This is particularly true if these goals can be accommodated in a way that causes minimal disruption to competition. Mergers constitute a powerful tool in the pursuit of public interest goals and they can directly or indirectly affect all manner of regional and national policies.⁷ Could it not, therefore, be considered reckless to completely ignore the social impact of mergers by overlooking public interest factors, all in the name of legal certainty?

⁷ Barry J Rodger, ‘UK merger control: politics, the public interest and reform’ (2000) 21(1) ECLR 24, 24.

Townley, who is very much one of the ‘younger members of the family’ referred to by Lewis, doubts the credentials of disregarding public interest goals to maintain certainty. He notes that, despite the increasing consensus that believes economic efficiency to be the sole purpose of competition law, there remains support for the conflicting view ‘that competition policy is based on multiple values that cannot be reduced to a single economic goal’.⁸ Therefore, it may actually be more justifiable and worthwhile to sacrifice a degree of procedural certainty in the interests of achieving wider social goals. After all, public interest will no doubt be applied more consistently as time progresses and where there is more guidance and case law to refer to. As such, there are clear motives for proposing a framework under which public interest criteria can be accommodated effectively within modern-day merger control. But, of course, this demands the prerequisite of first evaluation the individual concerns that have been attributed to the consideration of the public interest.

6.3. EVALUATING THE CONCERNS OF THE PUBLIC INTEREST

6.3.1. The concerns of framing the public interest in merger legislation

There exist a number of different ways in which countries can frame public interest criteria within their domestic merger legislation, as the analysis in Chapter 5 explored. In general terms, these can be grouped into ‘no public interest’,⁹ ‘exceptional public interest’,¹⁰ and ‘broader public interest’.¹¹ Given that 88% of countries have shown a preference for taking account of the public interest, we shall assume that ‘ignoring public interest criteria’ is not a viable option for overcoming the concerns noted in this section, as the vast majority of states have shown a willingness to embed the

⁸ Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing, Oxford 2009) 1.

⁹ Which usually manifests itself as a pure or very strict competition-based approach.

¹⁰ This can take the form of a statutory public interest exception or a sector-specific public interest exception; see 5.2.2.

¹¹ These are most frequently substantive tests that include public interest criteria (‘public interest tests’), but could also appear as a ‘broad public interest test’ that can be applied to an infinite number of scenarios.

public interest into their merger regimes despite these concerns. This leaves ‘exceptional public interest’ and ‘broader public interest’ and, without doubt, the latter category appears to aggravate these concerns to a far greater extent.

When we refer to the perceived threat that public interest criteria pose to legal certainty, we are essentially following the logic that ‘the public interest’ (as a concept that has a broader meaning than ‘competition’) can produce a greater number of outcomes in merger assessments. Without a precise definition or quantifiable value for what constitutes a public interest concern, assessments made using public interest criteria are ‘likely to be more subjective and unpredictable’,¹² meaning the merging parties will become less certain of the outcome of their transaction. This is particularly true under a ‘broader public interest’ approach, where a merger may be subject to more-than-one public interest condition. That said, intricacies within ‘exceptional public interest’ approaches can also create legal uncertainty – consider, for example, the UK regime which provides certainty to the extent that it lists three public interest exceptions, but retains an element of uncertainty by allowing a politician to propose new public interest grounds in lieu of primary legislation.¹³ It is certainly possible that countries can facilitate a degree of legal certainty by introducing guidelines that can provide firms with some anticipation of whether their merger is likely to be assessed on public interest grounds. Yet the task of drafting effective guidelines would be inherently more problematic in a country that enforces a ‘broader public interest’ approach.

Another concern is the threat that public interest considerations pose to harmonisation initiatives in international merger enforcement. This is based on the fear that too many different approaches to substantive merger assessments will result in a cross-border merger facing an excessive number of separate assessment hurdles. If the merger falls to be assessed in a multitude of countries, each with their own custom public interest

¹² Alex Chisholm, ‘Competition and politics: what does a healthy relationship look like?’ (Chatham House conference on ‘Politicization of Competition Policy: Myth or Reality?’, London, 18 June 2015) <<http://www.gov.uk/government/speeches/alex-chisholm-speaks-about-competition-and-politics>> accessed 31 May 2016.

¹³ Residual power derived under Enterprise Act 2002, s 58(3).

criteria, this would make it very difficult for the merging parties to align their deal in a manner that is likely to be met with approval in all jurisdictions. Indeed, predicting how decision-makers in different countries will interpret competition provisions has proved challenging enough in practice (particularly in terms of market definition, efficiency justifications, etc), but the application or relevance of public interest criteria can sometimes be impossible to predict, particularly where the public interest is enforced via political intervention.¹⁴ This may have the effect of deterring cross-border merger activity, given the extensive costs that procedural and substantive inconsistencies between jurisdictions create for merging firms.¹⁵ But, once again, given that the vast majority of countries accommodate public interest criteria, perhaps now is the time for the ‘harmonisation champions’ to adopt a change of strategy and focus on encouraging harmonisation towards an approach that applies public interest criteria in a way that seeks to allay some of the key concerns noted in this chapter. Furthermore, if – as the empirical findings of this thesis suggest – a developing country is twice as likely to adopt a ‘broader public interest’ approach compared to a developed country, this may suggest that development goals (or developing countries) should be afforded additional guidance, so as to ensure that cross-border merger activity is not deterred as a result. South Africa, a state that has incorporated public interest criteria into its substantive test for assessment, is itself considered something of a torchbearer for other developing countries seeking to accommodate public interest criteria,¹⁶ and the Competition Commission of South Africa has published detailed guidance on how it will assess public interest criteria during its merger review.¹⁷

¹⁴ Donald Baker, ‘Antitrust merger review in an era of escalating cross-border transactions and effects’ (2000) 18 *Wisconsin International Law Journal* 577, 579.

¹⁵ Daniel A. Crane, ‘Substance, Procedure, and Institutions in the International Harmonization of Competition Policy’ (2009) 10(1) *Chicago Journal of International Law* 146.

¹⁶ Dennis Davis and Lara Granville, ‘South Africa – The Competition Law System and the Country’s Norms’ in Fox & Trebilock (eds) *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP 2013) 270.

¹⁷ Competition Commission South Africa, *Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998* (Economic Development Department, Notice 309 of 2016, 31 May 2016).

6.3.2. The concerns of appointing a public interest decision-maker

6.3.2.1. *Regulatory capture and the prospect of group decision-making*

Although this thesis has noted that all decision-makers are at risk of regulatory capture in one form or another, it appears politicians exhibit a particular proneness to bias; the *NewsCorp/BSkyB* case being a stark reminder of this. Politicians may feel under pressure to pursue personal ambition or short-term political goals (such as re-election),¹⁸ and it is for this reason that it is difficult to imagine a scenario where a politician would make a decision that was in some politically inconvenient for them. Equally, due to the risk posed by confirmation bias among expert regulators, it is hard to envisage a situation where an NCA or sector regulator would treat the influence of public interest issues on a par with economic or market-specific concerns. Indeed, evidence from behavioural economics suggests that confirmation bias within regulators may be at epidemic levels, causing decision-makers to attribute too much emphasis to issues that they have a specialist interest in,¹⁹ or – where the authority is not independent – to make decisions that serve the interests of the politician overseeing the decision-maker.²⁰ This is problematic, as it indicates that all individual decision-makers are in some way prone to bias, even in the absence of lobbying.

Aside from the identity of the decision-maker, the law itself can – to some extent – predetermine the risk of lobbying arising in practice, depending on how much scope, if any, the merger control legislation affords to public interest considerations. Responding to suggestions that the list of UK public interest exceptions might be extended in the future, the Chief Executive of the Competition and Markets Authority, Alex Chisholm, said that there ‘is less scope for lobbying to affect the outcome [of a

¹⁸ For a useful overview see Michael E. Levine and Jennifer L. Forrence, ‘Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis’ (1990) 6 *Journal of Law, Economics and Organization* 167.

¹⁹ James C. Cooper, ‘Behavioral Economics and Biased Regulators’ (2013) *Mercatus on Policy* <<http://mercatus.org/publication/behavioral-economics-and-biased-regulators>> accessed 31 May 2016.

²⁰ James C. Cooper and William E. Kovacic, ‘Behavioural economics: implications for regulatory behavior’ (2012) 41(1) *Journal of Regulatory Economics* 41.

case] in a narrow competition-based assessment'.²¹ Indeed, by way of emphasising the importance that Mr Chisholm attributes to the risk of lobbying created by public interest provisions, he referred to it as one of 'the big 3 challenges' that lay ahead for the CMA, when announcing his decision to call time on his tenure.²² The premise here is that, when prospective lobbyists realise that there is no legislative scope for the decision-maker to consider or act on public interest concerns, their incentives to lobby are reduced, or at least redirected towards the government to reform the law.²³

As Chapter 3 alluded to, it is interesting to consider whether 'group decision-making' can have the effect of alleviating the threat posed by lobbying and bias. In the UK context, calls for group decision-making have previously been referred to in the context of public interest mergers, in the form of both an independent 'Mergers and Takeovers Commission',²⁴ and a division within the CMA that specialises in public interest assessments (and whose members include civil servants, industry figures, trade unions, consumer associations, lawyers and academics).²⁵ There are signs, therefore, that group decision-making by expert panels may be a viable option in the public interest arena. If we refer to insights from behavioural economics, there is evidence to suggest that decision-making in conditions where deliberations are allowed will tend to be influenced by group members that take the 'median position',

²¹ Alex Chisholm, 'Competition and politics: what does a healthy relationship look like?' (Chatham House conference on 'Politicization of Competition Policy: Myth or Reality?', London, 18 June 2015) <<http://www.gov.uk/government/speeches/alex-chisholm-speaks-about-competition-and-politics>> accessed 31 May 2016.

²² Specifically, Chisholm refers to the CMA's ability to deal with 'challenges to the primacy of competition analysis when sensitive mergers give rise to calls for public interest interventions'; Alex Chisholm, 'The CMA's achievements over the last 2 years' (Whitehall & Industry Group Breakfast Briefing, London, 11 May 2016) <<https://www.gov.uk/government/speeches/alex-chisholm-on-the-cmas-achievements-over-the-last-2-years>> accessed 31 May 2016.

²³ Lobbying in this context has been cited as a reason for countries adopting protectionist trade policies; Kym Anderson, 'Lobbying Incentives and the Pattern of Protection in Rich and Poor Countries' (1995) 43(2) *Economic Development and Cultural Change* 401.

²⁴ Barber B, 'Cadbury shows takeovers need reform' *The Guardian* (London, 22 February 2010) <<http://www.theguardian.com/commentisfree/2010/feb/22/takeovers-reform-kraft-cadbury>> accessed 31 May 2016.

²⁵ Aeron Davis and others, 'Takeovers and the Public Interest: Responsible Capitalism in Practice' (2013) Policy Network Paper 14 <www.policy-network.net/publications/4435/Takeovers-and-the-Public-Interest> accessed 31 May 2016.

rather than by group members adopting an extreme position.²⁶ The risk of internal bias within the group would therefore appear to be minimal, subject to there being a sufficient number of decision-makers within the group. There is also evidence that group decision-making fosters better outcomes when decisions require members to estimate imprecise probabilities, which is particularly beneficial when making decisions that produce long-term effects.²⁷ The reason for the success of teams of decision-makers relates to the opportunity that the dynamics of group decision-making facilitate in terms of effective communication and persuasion.²⁸ And, of course, ‘safety in numbers’ means that the potential influence of external lobbying is significantly reduced in comparison to lobbying an individual, simply due to the need for the lobbyist to ‘convince’ more than one individual.

6.3.2.2. Case Study: UK House of Lords’ Media Plurality Proposals

In some countries, proposals have been made to completely overhaul the institutional design of the public interest decision-making process in an effort to overcome bias and guard against undue lobbying and bias. By way of illustrating the degree to which a country has considered introducing decision-making reforms, an intriguing case study is the UK House of Lords’ proposals with regards to media public interest mergers.²⁹ In light of the numerous scandals and instances of lobbying that overshadowed the *NewsCorp/BSkyB* transaction detailed in Chapter 4, the Communications Committee of the House of Lords published a ‘Report on Media Plurality’ in which it proposed a number of changes to the regulation of media ownership in the UK.³⁰ Among the most notable of these was the proposal to grant

²⁶ See eg Attila Ambrus, Ben Greiner and Parag Pathak, ‘Group versus individual decision-making: is there a shift?’ (2009) IAS Economics Working Paper 2009-91.

²⁷ Steffen Keck, Enrico Diecidue and David V. Budescu, ‘Group decisions under ambiguity: Convergence to neutrality’ (2014) 103 *Journal of Economic Behavior & Organization* 60.

²⁸ David J. Cooper and John H. Kagel, ‘Are two heads better than one? Team versus individual play in signalling games’ (2005) 95 *American Economic Review* 477.

²⁹ Media plurality is a listed public interest exception under Enterprise Act 2002, s 58(2A)–(2C).

³⁰ House of Lords Communications Committee, *Media plurality* (HL 2013–14, 120–I) <www.publications.parliament.uk/pa/ld201314/ldselect/ldcomm/120/120.pdf> accessed 31 May 2016.

decision-making powers to the UK media regulator, Ofcom, in respect of mergers that raise potential media plurality concerns.³¹ As Chapter 4 detailed, these decision-making powers are currently conferred on the Secretary of State, yet under the House of Lords' proposals the institutional arrangement would change considerably.³²

The Report recommended that the quasi-judicial decision-making role should be removed from the Secretary of State and reassigned to Ofcom. By virtue of this, Ofcom would have the discretion to make interventions in mergers raising media plurality concerns, which would – in turn – trigger two separate assessments of competition and media plurality running in parallel: the former undertaken by the UK CMA and the latter by Ofcom itself. Should a conflict arise between the findings of the CMA and Ofcom on whether or not to permit the merger, the Ofcom Board – quite literally Ofcom's Board of Directors – would be tasked with balancing the conflicting interests and reaching a final decision. This is where the integrity of the proposed new regime begins to unravel.

By arranging the assessment procedure in this way, the final decision of the Ofcom Board is essentially a straight choice between the advice of the CMA and the advice of the Board's fellow personnel within Ofcom. The House of Lords has itself recognised this potential conflict of interest, suggesting that it may be alleviated by (a) preventing the Ofcom Board members from taking part in the initial plurality assessment, and (b) ensuring the Board is mindful of the potential for judicial review. Whether these conditions would provide an effective safeguard is debatable but, in any case, it is somewhat contradictory that such a recognisable risk of bias should exist within a proposal that seeks to overcome the perceived subjectivity of ministerial decision-making.

³¹ There are convincing arguments in the political science literature for delegating a role to regulatory agencies who – by means of their openness, consistency and expertise – should bring greater transparency and credibility to the decision-making process; Mark Thatcher, 'Regulation after delegation: independent regulatory agencies in Europe' (2002) 9(6) *Journal of European Public Policy* 954, 958.

³² For a useful flow diagram that charts the proposed assessment procedure, see House of Lords (n 29) 65.

An additional stumbling block within the Lords' proposals is that a significant proportion of Ofcom's staff have experience working within the media industry, which potentially leaves Ofcom prone to the 'revolving door' dilemma, whereby its former industry workers (who appreciate the unique attributes of the market) may be biased in favour of making decisions that benefit the media industry, rather than the public at large. Indeed, at the time these proposals were published, six of the eight sitting members of the Ofcom Board had previously held a private position within the media sector.

This case study is a prime example of the pitfalls that countries face in devising an institutional framework that guards against capture, and it is evident that reassigning decision-making powers from a politician to a regulatory authority may amount to substituting one problem for another. Moreover, although the House of Lords' proposals refer solely to mergers in the media sector, one cannot help but feel that they have the symbolic potential to alter perceptions of the role of political decision-making in UK public interest mergers more generally. If these proposals were to be enacted by Parliament, it would surely mark a retreat from the idea that politicians are best-placed to rule on matters affecting the public interest. Indeed, if there exists an inherent lack of confidence in the ability of ministers to remain impartial during the assessment process, would the House of Lords not also champion an agency-based approach to public interest mergers in other industries? To analogise with the UK banking sector, for example, should the Prudential Regulatory Authority – the regulator tasked with ensuring the stability of financial services firms – be given the final decision over banking mergers in cases where *financial stability* concerns are raised? It is an interesting proposition, but not one that is likely to be realised. Rather, it is more likely that the Lords' proposals are a reflection of the potential for undue influence that is ingrained in media markets and which, in turn, would appear to warrant special measures.

6.4. A FRAMEWORK FOR ACCOMMODATING PUBLIC INTEREST CRITERIA

6.4.1. A change of harmonisation strategy

In light of the findings that the thesis has drawn, this chapter proposes that the epistemic communities – such as the ICN, OECD and UNCTAD – adopt a change of strategy that departs from their harmonisation objective of encouraging countries to adopt a strict competition-based approach to merger control. This thesis puts forward the proposition that international merger control is facing a barricade with regard to convergence towards a pure competition-based approach to merger control and, although the empirical findings of this research suggest that global merger control is mainly aligned in the ‘strict competition-based’ field of assessment, it bears more resemblance to a ‘mixed’ approach than a ‘pure competition-based’ approach. While further substantive and procedural convergence may be possible in the future, now is the time for the competition policy community to recognise the preference – and inherent need – for states to protect their legitimate public interests in the application of merger control. This is likely to have a beneficial effect on global competition as – given that approximately 88% of states retain a scope for public interest considerations – states will begin to frame the public interest in ways that are less disruptive to competition and more conducive towards harmonisation. In order to facilitate further harmonisation between states, convergence efforts should focus on establishing ‘Best Practice Guidelines’ which will direct states to accommodate public interest criteria in ways that minimise disruption to competition.

6.4.2. Framing public interest criteria in merger control

Reflecting on the first of the two core research questions that were outlined in Chapter 1 of this thesis: *If it is legitimate to consider public interest criteria in merger assessments, how should this criteria be framed within merger control regimes?* Firstly, the question of ‘legitimacy’ is one that is perhaps more appropriately addressed within the realms of political science. Nevertheless, as a means of

correcting markets failure, few would doubt the legitimacy of the public interest being considered in order to protect eg national security or financial stability. We must conclude, therefore, that public interest criteria in merger control is at least capable of serving a legitimate purpose.

As such, the second part of the question becomes relevant, regarding how this criteria should be framed under merger legislation. Where possible, public interest criteria should be framed narrowly so that it applies only in ‘exceptional’ circumstances, thereby limiting the instances where it can create distortions to competition and uncertainty for merging parties. On the subject of minimising distortions to competition, it is clear that a positive application of public interest provisions (ie to allow an anticompetitive merger to proceed on public interest grounds) will have a greater distorting effect than a negative application (ie to block a merger on public interest grounds).³³ As such, there is logical basis for the framework to distinguish between the two,³⁴ meaning positive applications of public interest criteria should be afforded greater scrutiny than negative applications. This can be achieved if the state refuses outright to allow the prospect of a positive application under its merger legislation or, alternatively, by requiring that a positive application undergoes an additional phase of scrutiny (ie by more than one decision-maker). However, states should also be mindful of the risks posed by the negative application of public interest criteria, particularly as over-enforcement could have the effect of inhibiting merger activity.

The public interest provisions should be framed as clearly as possible within the legislation. They should refer to specific public interest factors, rather than a broad public interest test or an ambiguous term, such as ‘the national interest’. States should

³³ The logic to this is that a positive application will directly result in a lessening of competition in the relevant market, whereas a negative application would have no discernible impact on competition because no merger has taken place.

³⁴ As we saw in Chapter 3, the European Commission makes this distinction between the positive and negative application of public interest criteria in the context of Article 21(4), where a Member State cannot assume jurisdiction under the provision in order to allow an anticompetitive merger (positive application).

be mindful of selecting only the most important public interest goals for consideration; specifying too many goals increases the likelihood of conflicts occurring (not only between competition and public interest goals, but between competing public interest goals themselves). Public interest criteria should be expressly named (eg ‘media plurality’ or ‘environmental protection’) and their definitions should be provided within the legislation, so as to avoid inconsistent interpretations by decision-makers. In the interests of transparency, the legislation should also refer to the decision-making process by specifying the identity of the decision-maker(s) and the powers they derive under the statute. These statutory provisions should be supplemented with additional procedural guidance that is made publically available via the decision-maker.

6.4.3. Appointing a decision-maker to rule on the public interest

Turning next to the second core research question of the thesis: *Who should be tasked with making decisions based on public interest criteria?* In the main, there are notable benefits to be derived from adopting a default competition-based approach to merger assessment, with decision-making powers assigned to an independent expert competition authority. However, this thesis has also referred to arguments that a merger regime will derive constitutional legitimacy by appointing an elected politician to decide the outcome of mergers that have the potential to impact on the wider electorate. Yet, with regards to the role of politicians in this context, there is an important distinction to be drawn between deciding on the public interest, on the one hand, and scoping the public interest provisions, on the other. It is the conclusion of this thesis that constitutional legitimacy can be realised when a publically elected group of politicians take the necessary legislative decisions relating to the public interest provisions (including, defining the scope of the provisions, identifying the public interest criteria, and appointing a decision-maker). Beyond this, constitutional legitimacy is ensured, regardless of who is appointed as decision-maker. In light of this, the framework makes the proposition that politicians, NCAs or a combination of

the two are in a good position to undertake the decision-making process,³⁵ albeit subject to close scrutiny and judicial review.

If a country chooses to appoint a politician as the decision-maker, the framework advises that states adopt group decision-making, ie in the form of a panel of political decision-makers, as a means by which to overcome the risk of the politician becoming captured as a result of lobbying from special interest groups or because of political aspirations. This has the potential to dilute the effects of lobbying, as it will be necessary for lobbyists to influence the majority of the panel members, rather than a single individual. This is in addition to the evidence from behavioural economics that group decision-making promotes more reasoned and effective lines of argument. If group decision-making is not adopted by the state in question, the individual politician should be required to report any instances of unwarranted lobbying, as a minimum requirement.

6.5. CONCLUDING REMARKS

This chapter has sought to construct a synthesis of the main findings of the thesis in order to propose an effective framework for the accommodation of public interest criteria in merger control. As a prerequisite to the framework, the chapter proposes a strategic change in the harmonisation initiatives of the epistemic communities (such as the ICN, the OECD and UNCTAD). Rather than pursuing the universal application of a strict competition-based approach to merger control, these communities should instead seek to provide guidance to states on how to accommodate public interest criteria with minimal disruption to competition. The framework itself makes two main recommendations for merger regimes that adopt an ‘unstrict competition-based’ approach or a ‘mixed’ approach to merger assessments: (i) that public interest criteria is narrowly framed in merger laws, with use of clear, unambiguous terminology and supplementary guidance; and (ii) if a state chooses to appoint a politician as decision-

³⁵ The thesis has shown that most states appoint a politician, an NCA or both.

maker, that state should strongly consider the possibility of appointing a panel of political decision-makers as a means of protecting against capture. By adhering to this framework, it is believed a merger regime will be able to give effect to important public interest issues, without compromising competition, legal certainty or harmonisation to any notable extent.

CHAPTER 7

Conclusion

7.1. FINDINGS AND POLICY RECOMMENDATIONS

This thesis has endeavoured to explore and evaluate the role that has been afforded to the public interest in modern-day merger control. In doing so, it has sought to take a step back from the micro-legal studies that have gained prominence in the existing literature, and casts a wide net that considers the role of the public interest in merger control from a national, supranational and international perspective. Conclusions have been drawn throughout the thesis to inform the proposal of a new framework for how merger regimes may seek to accommodate the public interest effectively, in order to limit any distortions of competition, legal certainty and harmonisation that might ensue.

Chapter 2 set the scene for the thesis by introducing the abstract notion of the public interest in the context of merger control. It defines the ‘public interest’ negatively to incorporate any factor that is not related to competition or efficiency goals. Attributing this definition to the public interest, for the purposes of this thesis, avoids the confusion that has been created by the use of inconsistent terminology in the existing literature. The chapter identifies that, while competition and public interest goals are compatible in the most part – with competition serving the public interest in the vast majority of cases – a ‘mixed’ approach to merger assessment will inevitably involve trade-offs between the two sets of goals. This trade-off is fraught with practical and constitutional concerns that have fuelled a prominent ‘anti-public interest’ rhetoric in the academic literature.

Chapter 3 undertook an investigation to establish the extent to which public interest goals influence EU merger assessments under the EU Merger Regulation (EUMR). It

finds that the European Commission has afforded a very limited consideration to public interest goals in practice, despite possessing the authority to do so under the EUMR and via its duties derived under the Treaty of Lisbon. The Commission's strict competition-based approach has most likely materialised as a consequence of its long-term pursuit of a consumer welfare imperative, which has left public interest goals on the periphery. While Article 21(4) EUMR offers the potential for Member States to intervene in Commission assessments in order to serve legitimate national interests, its chequered case law and narrow interpretation obstructs its ability to allow public interest considerations to enter the EU regime via the back door. Although the strict competition-based approach creates benefits for consumers and certainty for merging firms, the Commission's reluctance to consider the wider goals of the EU when undertaking assessments raises constitutional issues, which appear to show procedural convenience driving substantive norms.

Chapter 4 identified two perceived weaknesses in relation to the management of public interest criteria in the UK merger regime. The first regards the residual power afforded to the Secretary of State under s 58(3) to propose new public interest exceptions while a merger is ongoing. Although this provision provides the flexibility to address unforeseen market failures, it has the potential to undermine confidence in the UK merger regime in the future if politicians begin to exercise the power more frequently. As such, efforts should be made to ensure that s 58(3) proposals are subjected to Parliamentary scrutiny that is comparable to that which is observed under primary legislative reform. The second is in relation to the appointment of a single Secretary of State as a decision-maker for mergers raising public interest issues. Although the Secretary of State's political dimension provides a degree of democratic legitimacy to the UK merger regime, appointing a single individual to rule on these transactions is fraught with the risks posed by lobbying, personal interests and other pressures. To overcome the risks of bias, the chapter suggests that either (i) the Secretary of State should be made to report any instances of lobbying, or (ii) the decision-making role should be expanded to encompass a group of politicians.

Chapter 5 conducted a comprehensive empirical study of 75 domestic states in pursuance of insights on the role that has been afforded to the public interest in merger regimes across a wide spectrum. It estimates that 88% of domestic states continue to assign a formal role to the public interest in their merger regimes. With reference to different options for framing the public interest in legislation and options for appointing decision-makers, the chapter finds that there are 21 possible approaches a state can take to accommodating public interest criteria. In practice, 15 of these approaches have been adopted, indicating a lack of substantive and procedural convergence has been realised in this aspect of merger control. However, most states have a preference for framing the public interest narrowly, and for appointing either NCAs or politicians as public interest decision-makers. Furthermore, the chapter statistically estimates the impact that key socio-economic variables have had on the choices that states make when accommodating the public interest. While variables that have traditionally been thought of as pivotal to merger design (including economic development) were found to have only localised influence, domestic governance was found to have a tangible influence on how states chose to frame the public interest within legislation.

Finally, Chapter 6 constructed a synthesis of the main findings of the thesis and concluded that public interest criteria can, indeed, play a legitimate role in modern-day merger control. In light of this, it puts forward several policy recommendations. Firstly, it calls on the epistemic communities of competition policy (ie the ICN, OECD and UNCTAD) to launch new harmonisation initiatives that seek to provide guidance to domestic states on how to accommodate public interest criteria with minimal disruption to competition and legal certainty. A novel framework is then proposed which makes two main recommendations to states that adopt an ‘unstrict competition-based’ approach or a ‘mixed’ approach to merger assessments: (i) that public interest criteria is narrowly framed in legislation, with use of clear terminology and supplementary guidance; and (ii) if a state chooses to appoint a politician as decision-maker, that state should strongly consider the possibility of appointing a panel of political decision-makers as a means of protecting against capture.

7.2. FUTURE RESEARCH

A number of pathways exist for extending this research thesis in the future, and several of these have already been proposed in the existing literature. With regards to the regulatory issues associated with considering public interest criteria in merger control, Motta and Ruta suggest that an interesting research endeavour would be to ask whether the European Commission possesses the requisite tools to ‘discipline’ Member State governments who pursue the creation and maintenance of ‘national champions’ in breach of the EUMR.¹ There is also ongoing interdisciplinary research into the prospect of devising a framework - or ‘European Toolkit’ – that NCAs and sector regulators could refer to when performing a balancing of competition and non-competition interests.²

As an extension to the empirical analysis of merger control regimes in Chapter 5, it would be interesting to test the findings of the socio-economic evaluation by adopting a more numerical-based technique for ‘ranking’ the states in order of the degree of influence they afford to the public interest. The assessment in Chapter 5 uses an ordinal ranking system, which has its practical benefits in terms of grouping data. However, if one were to calculate a public interest ‘score’ for each state, this score would then allow for the assessment of continuous variables and, in turn, the use of more sophisticated statistical tools – such as regression – to determine the degree of influence that each socio-economic variable affords to merger design. Indeed, Chapter 5 has referenced research by Carletti et al, who have adopted a similar approach in order to score the ‘effectiveness’ of merger control in individual states.³ The scoring system in this project also takes account of the performance of domestic merger

¹ Massimo Motta and Michele Ruta, ‘Mergers and National Champions’ in Oliver Falck, Christian Gollier and Ludger Woessmann (eds), *Industrial Policy for National Champions* (MIT 2011) 115.

² Amsterdam Centre for European Law and Governance, ‘Balancing Competition and Non-Competition Interests: Towards a European Toolkit’ <<https://www.uva.nl/binaries/content/assets/uva/en/about-the-uva/working-at-the-uva/vacancies/balancing-competition-and-non-competition-interests---prom.-acelg-jan.pdf>> accessed 25 September 2015.

³ Elena Carletti, Philipp Hartmann and Steven Ongena, ‘The economic impact of merger control legislation’ (2015) 42 *International Review of Law and Economics* 88.

regimes in practice, which is another way the analysis in Chapter 5 could be extended in order to move into the realms of legal realism.

Finally, given the criticism that has been targeted at certain foreign takeovers and takeover bids in the United Kingdom – such as *Kraft/Cadbury* and *Pfizer/AstraZeneca* – it would be interesting to undertake further empirical research (using public surveys) to identify public perceptions towards foreign investment and public interest mergers. Similar surveys have been undertaken in the past on a small-scale,⁴ and a more expansive survey could divulge a great deal of insight into (i) the supposed scepticism of the general public towards foreign takeovers, and (ii) what the public considers to be ‘in the public interest’ in the context of large-scale mergers. The survey could, for example, outline a number of hypothetical merger situations and request that the respondent specify whether they would permit or block the merger. Each hypothetical scenario could vary in terms of eg the ‘nationalities’ of the merging firms, and the type of public interest factor that the merger is likely to have an effect on.

⁴ For example, PRC has surveyed 100 people in 44 countries to ask for their views on trade and foreign investment; Pew Research Center, ‘Faith and Skepticism about Trade, Foreign Investment’ (*Global Attitudes & Trends*, 16 September 2014) <<http://www.pewglobal.org/2014/09/16/faith-and-skepticism-about-trade-foreign-investment/>> accessed 26 September 2015.

APPENDICES

APPENDIX 1. Collecting and compiling the domestic data set

The data collection for the empirical analysis in Chapter 5 has been extensive, utilising five different sources,¹ to sample 75 domestic states, and therein collect 1200 unique readings which feature in the table in Appendix 9, below.

The main task with regards to collecting the data has been to interpret the qualitative data sources (namely, the written information in the *GCR Handbook* and the *GWU Database* that relates to domestic merger control and competition law) and identify the relevant extracts that relate to the legislative framing options and the public interest decision-makers that each of the 75 states has adopted. Having identified the options that each state has adopted in practice, the sample states could then be grouped according to their public interest accommodation methods, ready for statistical testing. Segregating the sample in this way lays the foundations for the empirical analysis and, in the case of the legislative framing options (which have been subjected to ordinal ranking in *Figure 2*), it indirectly affords a quantitative dimension to the qualitative data.

For identifying a state's legislative framing choice and its public interest decision-maker, it has been necessary to refer to the *GCR Handbook* and, in particular, the answers that the expert practitioners had given to the following questions: Q1) 'What is the relevant legislation and who enforces it?'; Q8) 'Are there also rules on foreign

¹ These include: Global Competition Review, *Getting the Deal Through: Merger Control 2014* (Law Business Research 2013); Competition Law Center, 'Worldwide Competition Database' (*GWU Competition Law Center*) <<http://www.gwclc.com/World-competition-database.html>> accessed 3 June 2014. Hereafter, 'the GWU Database'; World Bank Governance Indicators; World Bank, 'Worldwide Governance Indicators (WGI) project' <<http://info.worldbank.org/governance/wgi/index.aspx#home>> accessed 23 March 2015; International Monetary Fund, *World Economic Outlook: Uneven Growth – Short- and Long-Term Factors* (IMF 2015) 150-153 <<http://www.imf.org/external/pubs/ft/weo/2015/01/>> accessed 5 May 2015; and OECD, 'FDI Regulatory Restrictiveness Index' (*OECD Investment*, June 2014) <www.oecd.org/investment/fdiindex.htm> accessed 8 January 2015.

investment, special sectors or other relevant approvals?'; Q19) 'What is the substantive test for clearance?'; and Q22) 'To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?'. The answers to these questions have been interpreted and added to rows 2-7 of Appendix 9. The accuracy of these readings was checked against the corresponding information in the *GWU Database* and, in order to increase the sample size to 75 states, the data for approximately 10 further states was harvested from the *GWU Database*. The decision was made to add these additional states in order to increase the number of developing countries in the sample, in order to minimise data distortions when testing the 'economic development' variable. Given that the *CGR Handbook* is aimed at legal practitioners, its selection of countries is somewhat skewed towards states that experience a relatively high degree of merger activity, or have a long-established merger regime. This means the *GCR Handbook* includes a higher proportion of developed countries. So there is a need to redress this imbalance in the dataset with reference to other sources.

Finally, the accuracy for the data relating to these 10 states was checked with reference to the national legislation websites, and the websites of state governments, sector regulators and national competition authorities

APPENDIX 2. Distribution of the domestic data set

Appendix 2A. Sample skewness for distribution of states adopting legislative framing options.

n	75
Σx_i	235 [†]
\bar{x}	3.1333
$\Sigma (x_i - \bar{x})^2$	148.6666
$\Sigma (x_i - \bar{x})^3$	70.3556
$\Sigma (x_i - \bar{x})^4$	672.5956
$\frac{n\sqrt{n-1}}{n-2} \frac{\Sigma(x_i - \bar{x})^3}{(\Sigma(x_i - \bar{x})^2)^{3/2}}$	0.3430 (Skewness of sample)
$\frac{n(n+1)(n-1)}{(n-2)(n-3)} \frac{\Sigma(x_i - \bar{x})^4}{(\Sigma(x_i - \bar{x})^2)^2}$	2.4422 (Kurtosis of sample)

[†] Represents total 'ranking values' where the each legislative framing options is assigned a value from 1-6 according to the potential influence they afford to the public interest (for rankings, see *Figure 2*). 1 = Option 1, 2 = Option 4, 3 = Option 3, 4 = Options 3 & 4, 5 = Option 2, 6 = Options 2 & 4.

Appendix 2B. List of states adopting each option for framing the public interest within legislation.

Option 1 (No PI)	Option 4 (Sector PI)	Option 3 (PI Exception)	Options 3 & 4 (PI Exception & Sector PI)	Option 2 (PI Test)	Options 2 & 4 (PI Test & Sector PI)
Barbados, Belgium, Chile, Columbia, Denmark, Faroe Islands, Fiji, Macedonia, Turkey	Albania, Bangladesh, Bolivia, Bosnia & Herz, Brazil, Canada, Croatia, Egypt, El Salvador, Finland, Honduras, Japan, Mexico, Serbia, Slovakia, Slovenia, United States, Uzbekistan, Venezuela	Argentina, Australia, Austria, China, Cyprus, Czech Republic, France, Hong Kong, Iceland, India, Ireland, Malta, Netherlands, New Zealand, Portugal, Saudi Arabia, Swaziland, Ukraine, United Kingdom	Bulgaria, Estonia, Germany, Hungary, Indonesia, Italy, Nigeria, Norway, Panama, Russia, Singapore, Spain, Sweden, Switzerland	Belarus, Kenya, Papua New Guinea, Republic of Korea, Morocco, Namibia, Romania, Thailand, Zambia	Greece, Israel, Poland, South Africa, Taiwan

Appendix 2C. List of states adopting each option for appointing a public interest decision-maker.

NCA	Politician	Regulator	Dual	N/A
Albania, Austria, Brazil, Czech Republic, Egypt, Finland, Iceland, Japan, Kenya, Republic of Korea, Malta, New Zealand, Papua New Guinea, Portugal, Romania, South Africa, Saudi Arabia, Slovakia, Swaziland, Thailand, Zambia	Belarus, Bolivia, China, Cyprus, France, Germany, Hong Kong, India, Ireland, Italy, Morocco, Namibia, Netherlands, Nigeria, Panama, Russia, Singapore, Switzerland, Ukraine, United Kingdom, Uzbekistan	Bulgaria, Canada, Croatia, El Salvador, Estonia, Honduras, Hungary, Mexico, Venezuela	Argentina, Australia, Bangladesh, Bosnia & Herz, Greece, Indonesia, Israel, Norway, Poland, Serbia, Slovenia, Spain, Taiwan, USA	Barbados, Belgium, Chile, Columbia, Denmark, Faroe Islands, Fiji, Macedonia, Turkey

Appendix 2D. Table specifying political independence of public interest decision-makers appointed by states within the sample. [Source: GWU Database].

	Total in sample	Proportion independent
NCA	21	13 (61.90%)
Politician	21	0 (0.00%)
Regulator	9	6 (66.67%)
Dual	15	6 (40.00%)
Total	69	25 (37.88%)

Appendix 2E. Distribution of combinations of legislative framing and public interest decision-maker options adopted by states.

	<i>NCA</i>	<i>Politician</i>	<i>Regulator</i>	<i>Dual</i>	<i>N/A</i>
Option 1	0	0	0	0	9
Option 4	6	2	6	5	0
Option 3	8	9	0	2	0
Options 3 & 4	0	7	3	4	0
Option 2	6	3	0	0	0
Options 2 & 4	1	0	0	4	0
Total	21	21	9	15	9

Appendix 2F. Descriptive statistics for decision-makers and the influence afforded to the public interest in the merger legislation they oversee.

	<i>NCA</i>	<i>Politician</i>	<i>Regulator</i>	<i>Dual</i>	<i>N/A</i>
<i>n</i>	21	21	9	15	9
Σx_i	72	74	24	56	9
\bar{x}	3.429	3.524	2.667	3.733	1

Where \bar{x} represents the mean category of each decision-maker.[†]

[†] The means are calculated by assigning a value from 1-6 for each legislative framing option, based on the potential influence that each option afford to the public interest (for rankings, see *Figure 2*). 1 = *Option 1*, 2 = *Option 4*, 3 = *Option 3*, 4 = *Options 3 & 4*, 5 = *Option 2*, 6 = *Options 2 & 4*.

APPENDIX 3. Compiling data for the analysis of socio-economic variables

As with any empirical study of this kind, the objective is to test for any relationship between the independent and dependent variables. Identifying which variables are independent and which are dependent is not always straightforward and much depends on how the study is framed. In simple terms, empiricists will generally seek to change the independent variable and measure the effect that this change has on the dependent variable. This logic can be applied to the analysis in Section 5.4. As the aim of Section 5.4 is to identify the effect that key socio-economic variables have on how the public interest is accommodated domestically, it follows that the *independent variable* will be the socio-economic variable and the *dependent variable* will be the method of accommodation.

APPENDIX 4. Estimating the influence of ‘economic development’ on accommodating the public interest in merger control

Appendix 4A. Table showing distribution of states adopting each legislative framing option according to their geographic region.

	<i>Africa</i>	<i>Asia</i>	<i>Europe</i>	<i>N. America</i>	<i>S. America</i>	<i>Oceania</i>
Option 1	0	0	5	1	2	1
Option 4	1	3	7	5	3	0
Option 3	1	4	11	0	1	2
Options 3 & 4	1	1	10	1	0	1
Option 2	4	2	2	0	0	1
Options 2 & 4	1	2	2	0	0	0
	8	12	37	7	6	5

Appendix 4B. Table showing distribution of states appointing each public interest decision-maker according to their geographic region.

	<i>Africa</i>	<i>Asia</i>	<i>Europe</i>	<i>N. America</i>	<i>S. America</i>	<i>Oceania</i>
NCA	5	4	9	0	1	2
Politician	3	5	11	1	1	0
Regulator	0	0	4	4	1	0
Dual	0	3	8	1	1	2
N/A	0	0	5	1	2	1
	8	12	37	7	6	5

APPENDIX 5. Estimating the statistical significance of ‘Economic development’ on accommodating the public interest

To examine whether a state’s economic development has a meaningful impact on how a state frames the public interest in merger legislation, the following null and alternative hypotheses can be proposed:

H_0 : The economic development of a state has no significant impact on the legislative framing option it chooses. ($\mu_{Developed} = \mu_{Developing}$).

H_1 : The economic development of a state has a significant impact on the legislative framing option it chooses. ($\mu_{Developed} \neq \mu_{Developing}$).

In order to test the legitimacy of H_0 , it is necessary to establish that there is no significant difference between the data relating to developed and developing states. For this analysis, we are only comparing two data categories, so it is appropriate to use a t -test.² A t -test assesses the similarity of two groups of data by comparing their respective means relative to the overall spread of the data. However, which type of t -test is appropriate depends on whether the variance between the two data groups is equal or not.³ The equality between the respective variances of the developed and developing state data can be assessed using Levene’s test, as detailed in Appendix 5A, below.⁴

² To compare the statistical similarity of three-or-more data groups, an analysis of variance (ANOVA) would be required.

³ David W Nordstokke and others, ‘The operating characteristics of the nonparametric Levene test for equal variances with assessment and evaluation data’ (2011) 16(5) Practical Assessment, Research & Evaluation 1.

⁴ Because the sample data is not distributed normally (rather, it is positively skewed, see Appendix 2A), a non-parametric Levene’s test is required. *ibid* 2.

Appendix 5A. Non-parametric Levine’s test for equality of variances between developed and developing states, at $p = 0.05$ significance level.

($H_0: \sigma_{Developed}^2 = \sigma_{Developing}^2$ and $H_1: \sigma_{Developed}^2 \neq \sigma_{Developing}^2$).

Source of Variation	SS	df	MS	F	p - value
A (Between Groups)	8788.468	5	1757.694	361.420	0.000
B (Within Groups)	335.568	69	4.863		
Total	9124.036	74			

$p < 0.05$, so reject null hypothesis.

In this instance, Levine’s test returns a p -value which is less than 0.05 (the level of significance), so we reject the null hypothesis that the variance between the data groups is equal. As such, when comparing the respective means of the developed state and developing state data groups, it is important that the t -test assumes unequal variances. The results of the t -test feature in Appendix 5B, below.

Appendix 5B. Two-sample t -test assuming unequal variances between developed and developing states, at $p = 0.05$ significance level.

($H_0: \mu_{Developed} = \mu_{Developing}$).

	Developed	Developing
n	38	37
\bar{x}	3.2895	2.9730
$SD = \sqrt{\frac{\Sigma(x_i - \bar{x})^2}{n-1}}$	1.7248	2.3048
df	70.993	
t	0.965	
p -value	0.338	

$p > 0.05$, so do not reject null hypothesis.

As the table illustrates, the t -test returns a p -value of 0.338, meaning we fail to reject the null hypothesis H_0 . We therefore conclude that there is a significant probability

that the economic development of a state has *no* significant impact on the legislative framing option it chooses.

Appendix 5C. Table showing distribution and proportions of developed and developing states appointing public interest decision-makers.

	<i>Developed</i>	<i>Developing</i>
NCA	11 (31.4%)	10 (32.3%)
Politician	12 (34.3%)	9 (29.0%)
Regulator	2 (5.7%)	7 (22.6%)
Dual	10 (28.6%)	5 (16.1%)
N/A [†]	3	6
	35 (38)	31 (37)

[†] Figures for ‘N/A’ are not counted when calculating percentages because the state has chosen not to accommodate the public interest and, as such, does not exercise a choice to appoint a decision-maker.

APPENDIX 6. Observing the relationship between types of legal systems and how states accommodate public interest

Appendix 6A. Table showing distribution and proportions of legislative framing options adopted in each type of legal system.

	<i>Civil</i>	<i>Common</i>	<i>Religious</i>	<i>Mixed</i>
Option 1	7	2	0	0
Option 4	15	3	1	0
Option 3	9	6	1	3
Options 3 & 4	11	1	0	2
Option 2	3	1	1	4
Options 2 & 4	3	1	0	1
Total	48	14	3	10

Appendix 6B. Table showing distribution and proportions of public interest decision-makers appointed in each type of legal system.

	<i>Civil</i>	<i>Common</i>	<i>Religious</i>	<i>Mixed</i>
NCA	11	2	2	7
Politician	12	5	1	2
Regulator	8	1	0	0
Dual	10	4	0	1
N/A	7	2	0	0
Total	48	14	3	9

APPENDIX 7. Estimating the statistical significance of ‘Effectiveness of domestic governance’ on accommodating the public interest

H_0 : The level of ‘rule of law’ in a state has no significant impact on the legislative framing option it chooses.

$$(\mu_{\text{Opt1}} = \mu_{\text{Opt4}} = \mu_{\text{Opt3}} = \mu_{\text{Opt3\&4}} = \mu_{\text{Opt2}} = \mu_{\text{Opt2\&4}}).$$

H_1 : The level of ‘rule of law’ in a state has a significant impact on the legislative framing option it chooses.

(Not every μ is equal).

Appendix 7A. Descriptives of adherence to ‘rule of law’ and chosen legislative framing options.

	Option 1 (No PI)	Option 4 (Sector PI)	Option 3 (PI Exception)	Options 3 & 4 (PI Exception & Sector PI)	Option 2 (PI Test)	Options 2 & 4 (PI Test & Sector PI)
n	9	19	19	14	9	5
Σx_i	624.17	919.91	1428.43	952.60	405.22	358.77
μ	69.352	48.416	75.181	68.043	45.024	71.754
$\Sigma (x_i - \mu)^2$	6211.29	17416.38	11572.70	11357.14	3181.18	481.80

Appendix 7B. One-way ANOVA for effect of adherence to ‘rule of law’ on chosen legislative framing option.

Source of Variation	SS	df	MS	F	p - value	F crit
A (Between Groups)	10853.18	5	2170.6357	2.9823	< 0.05	2.35
B (Within Groups)	50220.49	69	727.8331			
Total	61073.67	74				

$F(5,69) = 2.9823$, $p < 0.05$; $F(5,69) > 2.35$, so reject H_0 .

H_0 : The level of ‘rule of law’ in a state has no significant impact on the public interest decision-maker it appoints.

$$(\mu_{NCA} = \mu_{Politician} = \mu_{Regulator} = \mu_{Dual} = \mu_{N/A})$$

H_1 : The level of ‘rule of law’ in a state has a significant impact on the public interest decision-maker it appoints.

(Not every μ is equal).

Appendix 7C. Descriptives of adherence to ‘rule of law’ and chosen decision-maker.

	NCA	Politician	Regulator	Dual	N/A
n	21	21	9	15	9
Σx_i	1353.54	1244.55	436.03	1030.81	624.17
μ	64.454	59.264	48.448	68.721	69.352
$\Sigma (x_i - \mu)^2$	12810.69	21133.57	8303.98	9533.89	6211.29

Appendix 7D. One-way ANOVA for effect of adherence to ‘rule of law’ on chosen decision-maker.

Source of Variation	SS	df	MS	F	p - value	F crit
A (Between Groups)	3080.25	4	770.0620	0.9295	< 0.05	2.50
B (Within Groups)	57993.42	70	828.4774			
Total	61073.67	74				

$$F(4,70) = 0.9295, p < 0.05$$

$F(4,70) < 2.50$, so do not reject H_0 .

APPENDIX 8. Estimating the statistical significance of ‘Openness to Foreign Investment’ on accommodating the public interest

H_0 : The openness of a state to foreign direct investment has no significant impact on the legislative framing option it chooses.

$$(\mu_{\text{Opt1}} = \mu_{\text{Opt4}} = \mu_{\text{Opt3}} = \mu_{\text{Opt3\&4}} = \mu_{\text{Opt2}} = \mu_{\text{Opt2\&4}})$$

H_1 : The openness of a state to foreign direct investment has a significant impact on the legislative framing option it chooses.

(Not every μ is equal).

Appendix 8A. Descriptives of openness to foreign direct investment and chosen legislative framing options.

	Option 1 (No PI)	Option 4 (Sector PI)	Option 3 (PI Exception)	Options 3 & 4 (PI Exception & Sector PI)	Option 2 (PI Test)	Options 2 & 4 (PI Test & Sector PI)
n	5	9	15	10	3	4
Σx_i	0.215	0.759	1.998	0.891	0.210	0.277
μ	0.043	0.084	0.133	0.089	0.070	0.069
$\Sigma (x_i - \mu)^2$	0.0009	0.0363	0.2304	0.0914	0.0081	0.0040

Appendix 8B. One-way ANOVA for effect of openness to foreign direct investment on chosen legislative framing option.

Source of Variation	SS	df	MS	F	p - value	F crit
A (Between Groups)	0.0413	5	8.26×10^{-3}	0.8905	< 0.05	2.45
B (Within Groups)	0.3710	40	9.28×10^{-3}			
Total	0.4123	45				

$F(5,40) = 0.8905$, $p < 0.05$; $F(5,40) < 2.45$, so do not reject H_0 .

H_0 : The openness of a state to foreign direct investment has no significant impact on the public interest decision-maker it appoints.

$$(\mu_{\text{NCA}} = \mu_{\text{Politician}} = \mu_{\text{Regulator}} = \mu_{\text{Dual}} = \mu_{\text{N/A}})$$

H_1 : The openness of a state to foreign direct investment has a significant impact on the public interest decision-maker it appoints.

(Not every μ is equal).

Appendix 8C. Descriptives of openness to foreign direct investment and chosen decision-maker.

	NCA	Politician	Regulator	Dual	N/A
n	14	12	4	11	5
Σx_i	1.353	1.367	0.427	0.988	0.215
μ	0.097	0.114	0.107	0.090	0.043
$\Sigma (x_i - \mu)^2$	0.1239	0.1568	0.0284	0.0837	8.5×10^{-4}

Appendix 8D. One-way ANOVA for effect of openness to foreign direct investment on chosen decision-maker.

Source of Variation	SS	df	MS	F	p - value	F crit
A (Between Groups)	0.0187	4	4.67×10^{-3}	0.4867	< 0.05	2.60
B (Within Groups)	0.3936	41	9.60×10^{-3}			
Total	0.4123	45				

$$F(4,41) = 0.4867, p < 0.05$$

$F(4,41) < 2.60$, so do not reject H_0 .

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Albania	Argentina	Australia	Austria	Bangladesh
1. Country code	ALB	ARG	AUS	AUT	BAN
Merger-specific variables					
2. Substantive test	SLC	Restrict/Reduce comp	SLC	C/S Dom Position	Adverse effect comp
3. Direct scope to consider the public interest (PI)?	No	Yes	Yes	Yes	No
4. PI part of substantive test? (Option 2)	No	No	No	No	No
5. PI exceptions to substantive test? (Option 3)	No	Yes	Yes	Yes	No
6. Parallel sector-specific policy? (Option 4)	Yes	No	No	No	Yes
7. Who makes the PI decision?	NCA	NCA + Gov agency	NCA + Sector reg	NCA	NCA + Sector reg
8. Are decision-maker(s) independent of government?	Yes	No	Yes	Yes	No
Socio-economic variables					
9. Geographic region	Europe	S. America	Oceania	Europe	Asia
10. Developing country? (Source: IMF)	Yes	Yes	No	No	Yes
11. Legal system in place	Civil Law	Civil Law	Common Law	Civil Law	Common Law
12. Worldwide Governance Indicator 2013 (0-100)	35.55	28.44	95.73	97.63	22.75
12A. WB Political Stability Estimate (-2.5 to 2.5)	0.0580	0.0597	1.0164	1.3427	-1.6127
12B. WB Rule of Law Estimate (-2.5 to 2.5)	-0.5741	-0.7317	1.7536	1.8288	-0.8316
Foreign Direct Investment (FDI) variables					
13. OECD Member?	No	No	Yes	Yes	No
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	N/A	0.038	0.128	0.106	N/A

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Barbados	Belarus	Belgium	Bolivia	Bosnia & Herz.
1. Country code	BAR	BLR	BEL	BOL	BIH
Merger-specific variables					
2. Substantive test	40% + Adverse effect	Any relevant issue	SIEC	Tech & Finan Capacity	Dominance
3. Direct scope to consider the public interest (PI)?	No	Yes	No	No	No
4. PI part of substantive test? (Option 2)	No	Yes	No	No	No
5. PI exceptions to substantive test? (Option 3)	No	No	No	No	No
6. Parallel sector-specific policy? (Option 4)	No	No	No	Yes	Yes
7. Who makes the PI decision?	N/A	Government	N/A	Minister	NCA + Sector reg
8. Are decision-maker(s) independent of government?	N/A	No	N/A	No	Yes
Socio-economic variables					
9. Geographic region	N. America	Europe	Europe	S. America	Europe
10. Developing country? (Source: IMF)	Yes	Yes	No	Yes	Yes
11. Legal system in place	Common Law	Civil Law	Civil Law	Civil Law	Civil Law
12. Worldwide Governance Indicator 2013 (0-100)	81.99	20.38	89.10	14.22	50.24
12A. WB Political Stability Estimate (-2.5 to 2.5)	1.2929	-0.0254	0.9173	-0.3475	-0.3659
12B. WB Rule of Law Estimate (-2.5 to 2.5)	0.9990	-0.8888	1.4032	-1.0710	-0.1653
Foreign Direct Investment (FDI) variables					
13. OECD Member?	No	No	Yes	No	No
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	N/A	N/A	0.040	N/A	N/A

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Brazil	Bulgaria	Canada	Chile	China
1. Country code	BRA	BUL	CAN	CHI	CHN
Merger-specific variables					
2. Substantive test	C/S Dom Pos + LC	Dominance	P/L competition	Dominance	E/R competition
3. Direct scope to consider the public interest (PI)?	No	Yes	No	No	Yes
4. PI part of substantive test? (Option 2)	No	No	No	No	No
5. PI exceptions to substantive test? (Option 3)	No	Yes	No	No	Yes
6. Parallel sector-specific policy? (Option 4)	Yes	Yes	Yes	No	No
7. Who makes the PI decision?	NCA (Gov)	Sector reg	Sector reg	N/A	Political department
8. Are decision-maker(s) independent of government?	No	Yes	No	N/A	No
Socio-economic variables					
9. Geographic region	S. America	Europe	N. America	S. America	Asia
10. Developing country? (Source: IMF)	Yes	Yes	No	Yes	Yes
11. Legal system in place	Civil Law	Civil Law	Common Law	Civil Law	Civil Law
12. Worldwide Governance Indicator 2013 (0-100)	52.13	51.18	94.79	87.68	39.81
12A. WB Political Stability Estimate (-2.5 to 2.5)	-0.2782	0.1755	1.0307	0.3734	-0.5460
12B. WB Rule of Law Estimate (-2.5 to 2.5)	-0.1193	-0.1373	1.7398	1.3384	-0.4559
Foreign Direct Investment (FDI) variables					
13. OECD Member?	No	No	Yes	Yes	No
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	0.101	N/A	0.173	0.057	0.418

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Colombia	Croatia	Cyprus	Czech Republic	Denmark
1. Country code	COL	CRO	CYP	CZE	DEN
Merger-specific variables					
2. Substantive test	SLC	SIEC	Dominance	SIEC	SIEC
3. Direct scope to consider the public interest (PI)?	No	No	Yes	Yes	No
4. PI part of substantive test? (Option 2)	No	No	No	No	No
5. PI exceptions to substantive test? (Option 3)	No	No	Yes	Yes	No
6. Parallel sector-specific policy? (Option 4)	No	Yes	No	No	No
7. Who makes the PI decision?	N/A	Sector Reg	Minister	NCA	N/A
8. Are decision-maker(s) independent of government?	N/A	Yes	No	Yes	N/A
Socio-economic variables					
9. Geographic region	S. America	Europe	Europe	Europe	Europe
10. Developing country? (Source: IMF)	Yes	Yes	No	No	No
11. Legal system in place	Civil Law	Civil Law	Common Law	Civil Law	Civil Law
12. Worldwide Governance Indicator 2013 (0-100)	40.76	60.19	81.52	82.46	98.58
12A. WB Political Stability Estimate (-2.5 to 2.5)	-1.2685	0.6140	0.5183	1.0525	0.9466
12B. WB Rule of Law Estimate (-2.5 to 2.5)	-0.4485	0.2646	0.9982	1.0022	1.8732
Foreign Direct Investment (FDI) variables					
13. OECD Member?	No	No	No	Yes	Yes
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	0.026	N/A	N/A	0.010	0.033

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Egypt	El Salvador	Estonia	Faroe Islands	Fiji
1. Country code	EGY	ELS	EST	FAR	FIJ
Merger-specific variables					
2. Substantive test	N/A	Signif limit comp	SIEC (restricts comp)	SIEC	SLC
3. Direct scope to consider the public interest (PI)?	Yes (in sector-spec)	No	No	No	No
4. PI part of substantive test? (Option 2)	No	No	No	No	No
5. PI exceptions to substantive test? (Option 3)	No	No	No (but informally)	No	No
6. Parallel sector-specific policy? (Option 4)	Yes	Yes	Yes	No	No
7. Who makes the PI decision?	NCA (Gov)	Sector reg	Sector reg	N/A	N/A
8. Are decision-maker(s) independent of government?	No	No	Yes	N/A	N/A
Socio-economic variables					
9. Geographic region	Africa	N. America	Europe	Europe	Oceania
10. Developing country? (Source: IMF)	Yes	Yes	No	No	Yes
11. Legal system in place	Religious Law	Civil Law	Civil Law	Civil Law	Common Law
12. Worldwide Governance Indicator 2013 (0-100)	34.12	29.86	86.26	98.58	22.27
12A. WB Political Stability Estimate (-2.5 to 2.5)	-1.6198	-0.0435	0.7253	--	-0.0266
12B. WB Rule of Law Estimate (-2.5 to 2.5)	-0.6020	-0.6753	1.1649	--	-0.8413
Foreign Direct Investment (FDI) variables					
13. OECD Member?	No	No	Yes	No	No
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	0.062	N/A	0.018	N/A	N/A

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Finland	France	Germany	Greece	Honduras
1. Country code	FIN	FRA	DEU	GRE	HON
Merger-specific variables					
2. Substantive test	SIEC	SLC	SIEC	SIEC (restricts comp)	Restrict free comp
3. Direct scope to consider the public interest (PI)?	No	Yes	No	No	No
4. PI part of substantive test? (Option 2)	No	No	No	Yes	No
5. PI exceptions to substantive test? (Option 3)	No	Yes	Yes	No	No
6. Parallel sector-specific policy? (Option 4)	Yes	No	Yes	Yes	Yes
7. Who makes the PI decision?	NCA	Politician	Politician	NCA / Sector reg	Regulator
8. Are decision-maker(s) independent of government?	Yes	No	No	Yes	No
Socio-economic variables					
9. Geographic region	Europe	Europe	Europe	Europe	N. America
10. Developing country? (Source: IMF)	No	No	No	No	Yes
11. Legal system in place	Civil Law	Civil Law	Civil Law	Civil Law	Civil
12. Worldwide Governance Indicator 2013 (0-100)	99.05	88.15	91.94	63.51	10.43
12A. WB Political Stability Estimate (-2.5 to 2.5)	1.3591	0.4236	0.9270	-0.1975	-0.4660
12B. WB Rule of Law Estimate (-2.5 to 2.5)	1.9256	1.3982	1.6154	0.4381	-1.2284
Foreign Direct Investment (FDI) variables					
13. OECD Member?	No	Yes	Yes	Yes	No
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	0.019	0.045	0.023	0.032	N/A

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Hong Kong	Hungary	Iceland	India	Indonesia
1. Country code	HKG	HUN	ICE	IND	IDN
Merger-specific variables					
2. Substantive test	SLC	SIEC	SIEC	Appreciable adverse effect	Monopoly/facilitate unfair business
3. Direct scope to consider the public interest (PI)?	Yes	Yes	Yes	Yes	Yes
4. PI part of substantive test? (Option 2)	No	No	No	No	No
5. PI exceptions to substantive test? (Option 3)	Yes	Yes	Yes	Yes	Yes
6. Parallel sector-specific policy? (Option 4)	No	Yes	No	No	Yes
7. Who makes the PI decision?	Minister	Sector reg	NCA	Government	NCA / Minister
8. Are decision-maker(s) independent of government?	No	Yes	Yes	No	No
Socio-economic variables					
9. Geographic region	Asia	Europe	Europe	Asia	Oceania
10. Developing country? (Source: IMF)	No	Yes	No	No	Yes
11. Legal system in place	Common Law	Civil Law	Civil Law	Hybrid Law	Civil + Religious
12. Worldwide Governance Indicator 2013 (0-100)	91.00	67.30	92.42	52.61	36.49
12A. WB Political Stability Estimate (-2.5 to 2.5)	0.8833	0.7794	1.2602	-1.1874	-0.5004
12B. WB Rule of Law Estimate (-2.5 to 2.5)	1.5434	0.5634	1.6451	-0.0989	-0.5544
Foreign Direct Investment (FDI) variables					
13. OECD Member?	No	Yes	Yes	No	No
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	N/A	0.029	0.167	0.264	0.324

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Ireland	Israel	Italy	Japan	Kenya
1. Country code	IRE	ISR	ITA	JAP	KEN
Merger-specific variables					
2. Substantive test	SLC	Significant harm to competition	Dominance (SIEC in practice)	Substantial restraint on competition	SLC + Public Interest
3. Direct scope to consider the public interest (PI)?	Yes	Yes	Yes	Yes	Yes
4. PI part of substantive test? (Option 2)	No	Yes	No	No	Yes
5. PI exceptions to substantive test? (Option 3)	Yes	No	Yes	No	No
6. Parallel sector-specific policy? (Option 4)	No	Yes	Yes	Yes	No
7. Who makes the PI decision?	Minister	NCA / Gov	Government	NCA (Gov)	NCA
8. Are decision-maker(s) independent of government?	No	No	No	No	Yes
Socio-economic variables					
9. Geographic region	Europe	Asia	Europe	Asia	Africa
10. Developing country? (Source: IMF)	No	No	No	No	No
11. Legal system in place	Common Law	Common Law	Civil Law	Civil Law	Mixed System
12. Worldwide Governance Indicator 2013 (0-100)	94.31	80.09	62.09	89.57	27.96
12A. WB Political Stability Estimate (-2.5 to 2.5)	0.8777	-1.0935	0.5098	0.9815	-1.1482
12B. WB Rule of Law Estimate (-2.5 to 2.5)	1.7208	0.9524	0.3569	1.4094	-0.7438
Foreign Direct Investment (FDI) variables					
13. OECD Member?	Yes	Yes	Yes	Yes	No
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	0.043	0.118	0.052	0.052	N/A

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Rep. of Korea	Macedonia	Malta	Mexico	Morocco
1. Country code	KOR	MKD	MLT	MEX	MOR
Merger-specific variables					
2. Substantive test	Anticompetitive effect	SIEC	Maintaining & Developing comp	Reduce/impair/prevent competition	Likely to infringe competition
3. Direct scope to consider the public interest (PI)?	Yes	No	Yes	No	Yes
4. PI part of substantive test? (Option 2)	Yes	No	No	No	Yes
5. PI exceptions to substantive test? (Option 3)	No	No	Yes	No	No
6. Parallel sector-specific policy? (Option 4)	No	No	No	Yes	No
7. Who makes the PI decision?	NCA	N/A	NCA	Sector reg	Prime Minister
8. Are decision-maker(s) independent of government?	No	N/A	No	Yes	No
Socio-economic variables					
9. Geographic region	Asia	Europe	Europe	N.America	Africa
10. Developing country? (according to IMF)	No	Yes	No	Yes	Yes
11. Legal system in place	Civil Law	Civil Law	Mixed System	Civil Law	Religious Law
12. Worldwide Governance Indicator 2013 (0-100)	78.67	49.29	87.20	35.07	47.39
12A. WB Political Stability Estimate (-2.5 to 2.5)	0.2362	-0.3737	1.0066	-0.7375	-0.4999
12B. WB Rule of Law Estimate (-2.5 to 2.5)	0.9373	-0.2009	1.3218	-0.5779	-0.2476
Foreign Direct Investment (FDI) variables					
13. OECD Member?	Yes	No	No	Yes	No
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	0.143	N/A	N/A	0.207	0.067

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Namibia	Netherlands	New Zealand	Nigeria	Norway
1. Country code	NAM	NED	NZL	NGA	NOR
Merger-specific variables					
2. Substantive test	Lessen comp + PI	SIEC	SLC	SLC	Strengthen signif restriction
3. Direct scope to consider the public interest (PI)?	Yes	No	Yes	Yes	No
4. PI part of substantive test? (Option 2)	Yes	No	No	No	No
5. PI exceptions to substantive test? (Option 3)	No	Yes	Yes	Yes	Yes
6. Parallel sector-specific policy? (Option 4)	No	No	No	Yes	Yes
7. Who makes the PI decision?	Minister	Minister	NCA	Government agency	Cabinet / NCA
8. Are decision-maker(s) independent of government?	No	No	Yes	No	No
Socio-economic variables					
9. Geographic region	Africa	Europe	Oceania	Africa	Europe
10. Developing country? (Source: IMF)	Yes	No	No	Yes	No
11. Legal system in place	Mixed System	Civil Law	Common Law	Mixed system	Civil Law
12. Worldwide Governance Indicator 2013 (0-100)	59.72	97.16	98.10	12.32	100.00
12A. WB Political Stability Estimate (-2.5 to 2.5)	0.9294	1.1170	1.4497	-2.0793	1.3315
12B. WB Rule of Law Estimate (-2.5 to 2.5)	0.2493	1.8088	1.8600	-1.1576	1.9680
Foreign Direct Investment (FDI) variables					
13. OECD Member?	No	Yes	Yes	No	Yes
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	N/A	0.015	0.240	N/A	0.085

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Panama	Papua New Guinea	Poland	Portugal	Romania
1. Country code	PAN	PNG	POL	PRT	ROM
Merger-specific variables					
2. Substantive test	Unreasonable effect on competition	SLC	SIEC	SIEC	SIEC
3. Direct scope to consider the public interest (PI)?	Yes	Yes	Yes	Yes	Yes
4. PI part of substantive test? (Option 2)	No	Yes	Yes	No	Yes
5. PI exceptions to substantive test? (Option 3)	Yes	No	No	Yes	No
6. Parallel sector-specific policy? (Option 4)	Yes	No	Yes	No	No
7. Who makes the PI decision?	NCA	NCA	NCA / Sector reg	NCA	NCA
8. Are decision-maker(s) independent of government?	No	Yes	No	Yes	Yes
Socio-economic variables					
9. Geographic region	N. America	Oceania	Europe	Europe	Europe
10. Developing country? (Source: IMF)	Yes	Yes	No	No	Yes
11. Legal system in place	Civil Law	Common Law	Civil Law	Civil Law	Civil Law
12. Worldwide Governance Indicator 2013 (0-100)	47.87	17.54	73.46	82.94	56.40
12A. WB Political Stability Estimate (-2.5 to 2.5)	-0.1336	-0.5245	0.9475	0.7405	0.1529
12B. WB Rule of Law Estimate (-2.5 to 2.5)	-0.2397	-0.9773	0.7853	1.0329	0.1064
Foreign Direct Investment (FDI) variables					
13. OECD Member?	No	No	Yes	Yes	No
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	N/A	N/A	0.072	0.007	0.008

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Russia	Saudi Arabia	Serbia	Singapore	Slovak Rep
1. Country code	RUS	SAU	SRB	SNG	SVK
Merger-specific variables					
2. Substantive test	Dominance	Lessening comp	Prevent/Restrict effective comp	SLC	SIEC
3. Direct scope to consider the public interest (PI)?	No	Yes	No	Yes	No
4. PI part of substantive test? (Option 2)	No	No	No	No	No
5. PI exceptions to substantive test? (Option 3)	Yes	Yes	No	Yes	No
6. Parallel sector-specific policy? (Option 4)	Yes	No	Yes	Yes	Yes
7. Who makes the PI decision?	Minister	NCA	NCA + Sector reg	Minister	NCA
8. Are decision-maker(s) independent of government?	No	No	Yes	No	Yes
Socio-economic variables					
9. Geographic region	Europe	Asia	Europe	Asia	Europe
10. Developing country? (Source: IMF)	No	No	Yes	No	No
11. Legal system in place	Civil Law	Religious Law	Civil Law	Common Law	Civil Law
12. Worldwide Governance Indicator 2013 (0-100)	24.64	60.66	44.55	95.26	63.98
12A. WB Political Stability Estimate (-2.5 to 2.5)	-0.7504	-0.4086	-0.0954	1.3338	1.0998
12B. WB Rule of Law Estimate (-2.5 to 2.5)	-0.7835	0.2647	-0.3429	1.7431	0.4462
Foreign Direct Investment (FDI) variables					
13. OECD Member?	No	No	No	No	Yes
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	0.181	0.342	N/A	N/A	0.049

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Slovenia	South Africa	Spain	Swaziland	Sweden
1. Country code	SVN	RSA	ESP	SWZ	SWE
Merger-specific variables					
2. Substantive test	SIEC	SLC + PI	Prevent maint'ance of effective comp	Substantial P/L comp	SIEC
3. Direct scope to consider the public interest (PI)?	No	Yes	Yes	No	Yes
4. PI part of substantive test? (Option 2)	No	Yes	No	No	No
5. PI exceptions to substantive test? (Option 3)	No	No	Yes	Yes	Yes
6. Parallel sector-specific policy? (Option 4)	Yes	Yes	Yes	No	Yes
7. Who makes the PI decision?	Ministers / Sector regs	NCA	Gov / Sector reg	NCA	NCA + Court
8. Are decision-maker(s) independent of government?	No	Yes	No	Yes	Yes
Socio-economic variables					
9. Geographic region	Europe	Africa	Europe	Africa	Europe
10. Developing country? (Source: IMF)	No	Yes	No	Yes	No
11. Legal system in place	Civil Law	Mixed System	Civil Law	Mixed System	Civil Law
12. Worldwide Governance Indicator 2013 (0-100)	80.57	57.82	81.04	42.18	99.53
12A. WB Political Stability Estimate (-2.5 to 2.5)	0.8656	-0.0575	0.0145	-0.4364	1.1269
12B. WB Rule of Law Estimate (-2.5 to 2.5)	0.9685	0.1269	0.9963	-0.4229	1.9540
Foreign Direct Investment (FDI) variables					
13. OECD Member?	Yes	No	Yes	No	Yes
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	0.007	0.055	0.021	N/A	0.059

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	Switzerland	Taiwan	Thailand	Turkey	Ukraine
1. Country code	SWI	TWN	THA	TUR	UKR
Merger-specific variables					
2. Substantive test	Dominance	Benefits to economy	4-part benefit test	Dominance	Monopolisation + signif restrict
3. Direct scope to consider the public interest (PI)?	Yes	Yes	Yes	No	Yes
4. PI part of substantive test? (Option 2)	No	Yes	Yes	No	No
5. PI exceptions to substantive test? (Option 3)	Yes	No	No	No	Yes
6. Parallel sector-specific policy? (Option 4)	Yes	Yes	No	No	No
7. Who makes the PI decision?	Government	NCA + Gov agency	NCA	N/A	Minister
8. Are decision-maker(s) independent of government?	No	Yes	No	N/A	No
Socio-economic variables					
9. Geographic region	Europe	Asia	Asia	Europe	Europe
10. Developing country? (Source: IMF)	No	No	Yes	Yes	No
11. Legal system in place	Civil Law	Civil Law	Mixed System	Civil Law	Civil Law
12. Worldwide Governance Indicator 2013 (0-100)	96.68	83.89	51.66	55.92	23.22
12A. WB Political Stability Estimate (-2.5 to 2.5)	1.3726	0.8638	-1.3221	-1.1948	-0.7577
12B. WB Rule of Law Estimate (-2.5 to 2.5)	1.7905	1.0443	-0.1334	0.0796	-0.8252
Foreign Direct Investment (FDI) variables					
13. OECD Member?	Yes	No	No	Yes	No
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	0.083	N/A	N/A	0.059	0.116

Appendix 9. Consolidated data set for domestic merger control and socio-economic variables

	United Kingdom	United States	Uzbekistan	Venezuela	Zambia
1. Country code	GBR	USA	UZB	VEN	ZAM
Merger-specific variables					
2. Substantive test	SLC	SLC	Dominance	Broad competition considerations	Market + SLC + Public Interest
3. Direct scope to consider the public interest (PI)?	Yes	No	No	No	Yes
4. PI part of substantive test? (Option 2)	No	No	No	No	Yes
5. PI exceptions to substantive test? (Option 3)	Yes	No	No	No	No
6. Parallel sector-specific policy? (Option 4)	No	Yes	Yes	Yes	No
7. Who makes the PI decision?	Politician	Gov agency + NCA	Gov agency	Sector reg	NCA
8. Are decision-maker(s) independent of government?	No	No	No	Yes	No
Socio-economic variables					
9. Geographic region	Europe	N. America	Asia	S. America	Africa
10. Developing country? (Source: IMF)	No	No	Yes	Yes	Yes
11. Legal system in place	Common Law	Common Law	Civil Law	Civil Law	Mixed Law
12. Worldwide Governance Indicator 2013 (0-100)	92.89	90.52	11.37	0.95	45.50
12A. WB Political Stability Estimate (-2.5 to 2.5)	0.4833	0.6081	-0.5489	-1.0772	0.3894
12B. WB Rule of Law Estimate (-2.5 to 2.5)	1.6732	1.5356	-1.2041	-1.7902	-0.3064
Foreign Direct Investment (FDI) variables					
13. OECD Member?	Yes	Yes	No	No	No
14. 2014 OECD FDI Index (Closed = 1, Open = 0)	0.061	0.089	N/A	N/A	N/A

Appendix 10. EU Member States and their substantive merger assessments

	SIEC	SLC	Dominance	Public interest?
Austria			x	Yes
Belgium	x			No
Bulgaria			x	Yes
Croatia	x			No
Cyprus			x	Yes
Czech Rep	x			No
Denmark	x			No
Estonia			x	Yes
Finland			x	No
France		x		Yes
Germany			x	Yes
Greece			x	Yes
Hungary	x			No
Ireland		x		Yes
Italy			x	Yes
Latvia			x	No
Lithuania			x	No
Luxembourg	N/A	N/A	N/A	N/A
Malta		x		Yes
Netherlands	x			Yes
Poland	x			Yes
Portugal			x	Yes
Romania	x			Yes
Slovakia			x	No
Slovenia	x			No
Spain	x			Yes
Sweden	x			Yes
United Kingdom		x		Yes

Appendix 11. European Commission and ECJ rulings on Article 21(4) TFEU and its scope.

Date	Case name	Decision maker	Effect on scope of Article 21(4)	Notes
Dec 1995	<i>Lyonnaise des eaux/Northumbrian Water</i>	Commission	Member State measures must be ‘appropriate, proportional and non-discriminatory’	Commission recognised the UK’s legitimate interest in safeguarding its water supply and sewerage management, and thereby granted the request.
Jan 1999	<i>EdF/London Electricity</i>	Commission	Measures must be merger-specific	Commission rejected UK’s application on grounds that domestic measures were already in place to regulate the entity.
Jul 1999	<i>BSCH/A. Champalimand</i>	Commission	Upheld need to notify Article 21(4) measures to the Commission	Prudential measures, which were not notified by Portugal, were rejected by the Commission.
Nov 2000	<i>Secil/Holderband/Cimpar</i>	Commission	--	Prudential measures, again not notified to the Portugal, were rejected by the Commission on grounds of incompatibility with the EU.
Dec 2005	<i>BBVA/ABN-Amro</i>	Commission	Not a formal Article 21(4) case	Prudential measures, proposed by Italy, rejected by Commission.
Oct 2005	<i>Unicredito/HVB</i>	Commission	Commission seen to use Article 21(4) as a tool to limit Member State intervention.	Prudential measures, Commission asked Polish government to justify its actions in accordance with Article 21(4), measures infringed Article 21 according to Commission.

Feb 2006	<i>GdF/Suez</i>	Commission	Not a formal Article 21(4) case	Commission was critical of France and Belgium's behaviour but made no intervention (as there were no physical measures in place).
Sep 2006	<i>E.ON/Endesa</i>	Commission	--	Spanish government sought to frustrate E.ON's bid for Endesa with state measures, Commission ordered their withdrawal pursuant to Article 21.
Sep 2006	<i>Abertis/Autostrade</i>	Commission	Reduces scope – Member States cannot 'invent' public interests at short notice to justify intervention.	Italy blocked merger bid from Spanish firm to acquire Italian 'toll motorway management' firm, Commission ruled Italy had breached Article 21 for failing to establish the public interest criteria sufficiently early.
Dec 2006	<i>E.ON/Endesa</i>	Commission	'Security' afforded a narrower meaning for the purposes of Article 21(4)	Spain argued 'security' interest under Article 21(4), argument refused by Commission.
Dec 2007	<i>ENEL/Acciona/Endesa</i>	Commission	--	Commission ruled that Spain measures breached free movement of capital and freedom of establishment principles, Article 21 infringed.
Mar 2008	<i>Commission v Spain</i>	ECJ	Reaffirms Commission's defensive and narrow use of Article 21(4)	Upheld Commission's findings in <i>E.ON/Endesa</i> .

LIST OF ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ANOVA	Analysis of variance
CAC	Competition Appeal Court of South Africa
CAT	Competition Appeals Tribunal
CMA	Competition and Markets Authority
COMESA	Common Market for Eastern and Southern Africa
CompComSA	Competition Commission of South Africa
CC	Competition Commission (United Kingdom)
DG COMP	Directorate-General for Competition
ECO	European Cartel Office
EUMR	European Union Merger Regulation
FDI	Foreign direct investment
FTA	Fair Trading Act 1973
GWU	George Washington University
GCR	Global Competition Review
ICN	International Competition Network
IMF	International Monetary Fund
MMC	Monopolies and Mergers Commission
NCA	national competition authority
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading
SIEC	significant impediment to effective competition
SLC	substantial lessening of competition
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNCTAD	United Nations Conference on Trade and Development

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